

MISSISSIPPI LAW JOURNAL

SYMPOSIUM ON GAMING IN MISSISSIPPI

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FOREWORD

When the soldiers had crucified Jesus, they put his garments into four piles, one for each of them. But they said, "Let's not tear up his robe," for it was seamless. "Let's throw dice to see who gets it." *John* 19:23-24 (The Living Bible).

Gambling has been a part of our society for thousands of years and presents important moral, social, cultural, and economic questions. The Symposium issue introduces a collection of articles dealing with questions and controversies surrounding the gaming industry in Mississippi. Since 1991, when the Attorney General of Mississippi concluded that dockside riverboat gambling was allowable, Mississippi propelled the gaming industry forward with a "splash." This new industry has brought with it economic development and increased tourism in Mississippi as well as its own set of problems. In the legal field many questions arise regarding how to treat problems that evolve as a result of our floating casinos. These questions include controversies over how to treat tort claims, employment issues, environmental questions, and economic issues. Because the gaming industry is such a new field for our state, most of these questions are still unanswered. In this issue of the *Journal*, the authors seek to clarify some common questions that practitioners have and to point out areas in which they are still no answers.

When we began discussing topics for our Symposium, the *Journal* considered several ideas—the criminal code, sovereign immunity, and ethics, to name a few. The idea of a gaming symposium was met with overwhelming support and enthusiasm. One professor even offered odds as to our decision to concentrate on gambling as a topic. Because of the timeliness of the issues presented in this publication, we decided to make the symposium issue our second publication of the year rather than our third, as is customary.

Thus, this symposium covers a wide range of topics in the field of gaming. It begins with an article written by Professor Ronald

Rychlak which traces the historical development of the gaming industry and discusses public policy considerations revolving around the industry. The second article is by Ben Stone, J. Adrian Smith, Scott E. Address, & Thomas L. Carpenter, Jr., and presents issues involving site approval in Mississippi as well as procedural matters and appealability from Gaming Board decisions. Next, Professor Richard McLaughlin addresses whether floating casinos are governed under admiralty law as vessels. The fourth article in this issue considers environmental concerns and impacts which have resulted from the influx of casinos into wetlands areas. This article was written by Jeffrey Reynolds and Dan Singletary. The next article, by Leland Smith and John Brady, argues for federal jurisdiction over certain personal injury claims which occur on the premises of riverboat casinos. The final article in this edition written by Professor Richard Barnes discusses the Indian Gaming Regulation Act and its application. The issues ends with four student written pieces.

Hopefully, this issue will provide practitioners, and perhaps even the judiciary, throughout Mississippi as well as other states with guidelines in dealing with this significant new area of law.

Sarah Frances Hardy
Symposium Editor

CASINO GAMING AND MISSISSIPPI'S ECONOMIC DEVELOPMENT

*Jimmy Heidel, Executive Director
Mississippi Department of Economic
and Community Development*

In August, 1992, casino gaming came to Mississippi as the first boats arrived on the Mississippi Gulf Coast. Since that time, gaming has spread across the Gulf Coast from Bay St. Louis to Biloxi; along the Mississippi River in Tunica, Washington, Warren, and Adams Counties; and in Neshoba County.

This quick rise of the gaming industry in our state has far exceeded anyone's expectations. While the growth rate has slowed slightly, new casinos continue to open at a steady pace. Eventually the marketplace will dictate the number of establishments to meet the demand.

What is the economic development impact of gaming on Mississippi and its tourism industry? A quick review of statistics compiled by the Center for Policy Planning and Research, Mississippi Institutions of Higher Learning, and the Mississippi Department of Economic and Community Development (MDECD), reveals the significance. In 1993, gaming accounted for 22,000 direct jobs, or 35.2% of all tourism and recreation jobs. State, city, and county governments received \$85.4 million in tax revenues from gaming, or 31.3% of the total tax revenue generated from the tourism industry. Indirectly, gaming created another 15,400 jobs in construction, infrastructure improvements, and such ancillary services as charter flights, restaurants, and hotels. The construction industry alone registered an 11.3% increase in employment in 1993.

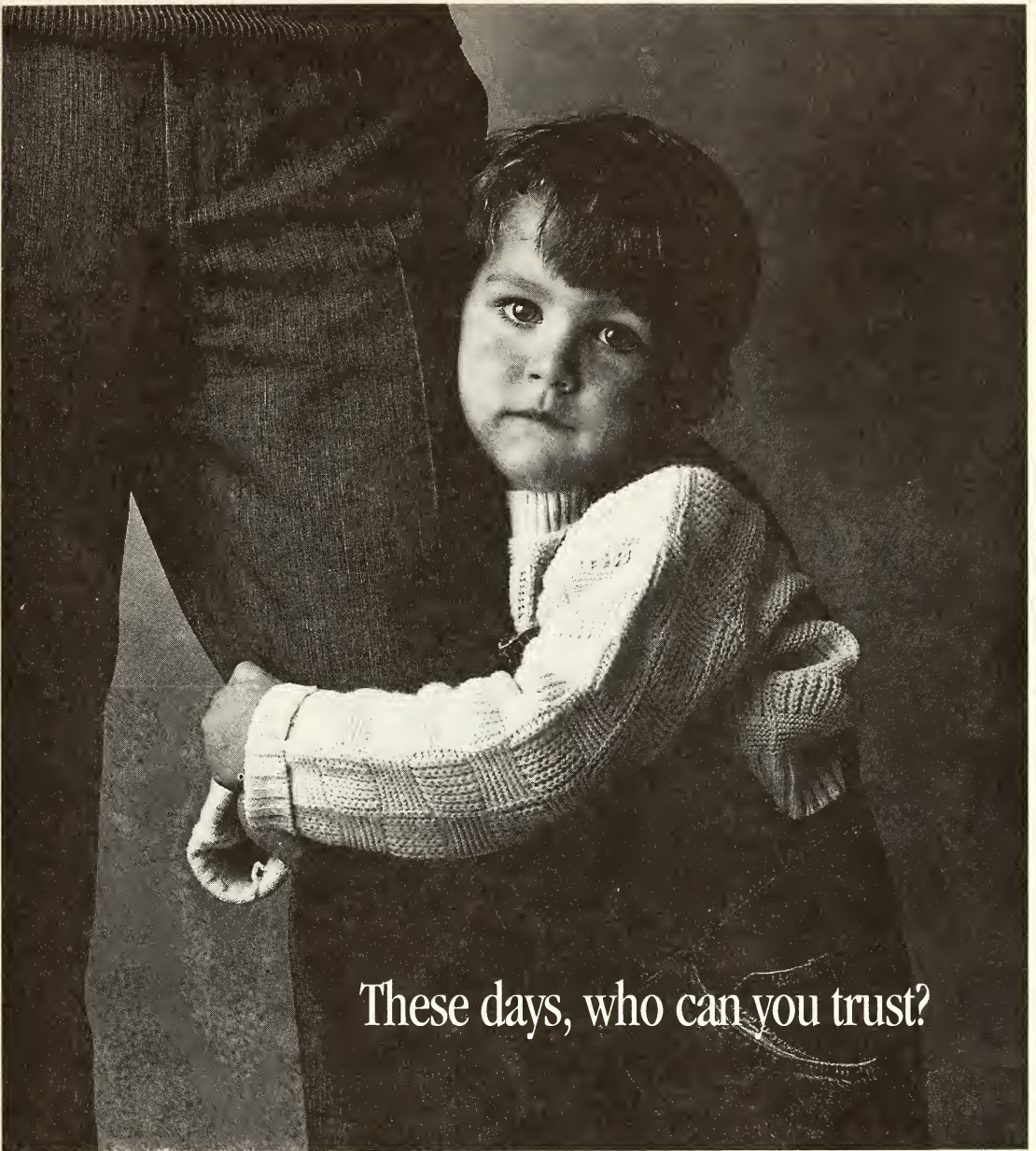
Who are the gaming industry's customers? An estimated 64% are out-of-state visitors, who also patronize hotels, restaurants, and other tourism services. With such a solid customer base from outside of Mississippi, gaming should continue to contribute to the tourism industry even when gaming operations begin to open in other states.

While the growth of the gaming industry has been driven by the marketplace, the interest of the MDECD has been in land-based tourism development which will not only support the increased traffic of the gaming boats, but stand alone as tourist destinations as well. Hotels, golf courses, outlet shopping malls, and various family entertainment areas fall into this group. Our agency's focus is securing these types of tourism investment which will remain no matter what the future of the gaming industry may hold.

Having said all of this, perspective is also in order in any discussion of the gaming industry and its impact on Mississippi's economy and economic development. While Mississippi has experienced tremendous growth in employment and tax revenues through this new tourist attraction, gaming accounted for less than 2% of Mississippi's gross state product of \$48 billion in 1993. Business and industry announced 530 new locations or expansions of existing manufacturing facilities in the state last year. Employment hit record levels. Specific industries recording strong employment growth in 1993 included rubber and plastics, 6.4%; furniture and fixtures, 4.1%; and lumber, 3.6%. In the non-manufacturing sector, retail trade employment increased 4.6%, and health services employment grew 6.3%.

The gaming industry has created thousands of jobs for Mississippians and generated millions of dollars of tax revenue for local and state governments. Along with this boom, however, has come questions and issues that can occur with any new industry: stress on the local infrastructure in the gaming counties, increased demand for social services, housing shortages. The appropriate entities—be they the local and state governments, the private sector, the marketplace, social service providers, or whoever—are addressing these concerns as they arise.

Gaming has its place in Mississippi's economic development as a part of our tourism development. While gaming has made strong contributions to our state's employment and revenue levels, it is one of several contributors including manufacturing, small business, agriculture, and services. All are important to our economic development mix. Together, they will keep Mississippi's economy prospering.



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THE INTRODUCTION OF CASINO GAMBLING: PUBLIC POLICY AND THE LAW

Ronald J. Rychlak*

I. INTRODUCTION

In 1992 there were two legal "riverboat" casinos in Mississippi. By mid-1994 the State was home to at least thirty casinos, and applications were on file for up to fifty more.¹ In fact, at one time a new casino opened in Mississippi about every two weeks.² Mississippi recently passed the \$1 billion mark in gambling revenue to make it the third-largest casino gaming jurisdiction in the United States, trailing only Nevada and New Jersey.³ Mississippi already has more casinos and more square feet of casino floorspace than Atlantic City⁴ and may

* Associate Professor of Law, The University of Mississippi School of Law. The author would like to acknowledge the contribution of the Lamar Order, which has made it possible for the law faculty to devote time in the summer to research projects.

¹ Laurel Campbell, *Declining Casino Profits, Building Plans at Odds*, COM. APPEAL (Memphis), July 24, 1994, at A1, A10. Although the revenue growth has been strong, growth is expected to exceed demand in the next 12 to 18 months. *Id.* At present, several corporations are taking a wait-and-see position. *Id.*

² Alan Sayre, *La. Casino Industry Stumbling*, CLARION-LEDGER (Jackson, Miss.), Sept. 6, 1994, at B5. Of course, several casinos are also beginning to close. See, e.g., Laurel Campbell, *Treasure Bay Files for Bankruptcy*, COM. APPEAL (Memphis), Jan. 11, 1995, at B4 (discussing financial woes of both Treasure Bay and Biloxi Belle).

³ Campbell, *supra* note 1, at A1.

⁴ According to the Mississippi Gaming Commission, the State now has twenty-nine casinos with a total of 1,270,502 square feet of floorspace. 1994 MISS. GAMING COMM'N ANN. REP. TO THE LEG. 34 [hereinafter GAMING REPORT]; see also Margaret Litvin, *Floating Casinos Gambling With the Environment; Mississippi Riverboats Under Fire*, USA TODAY, July 7, 1994, at A8 (Atlantic City has 797,155 square feet of casino floorspace and Las Vegas has 4,501,129).

surpass Las Vegas in the not too distant future.

Gambling casinos have changed the appearance of the Mississippi Gulf Coast, enriched very poor communities, and provided much-needed funds for state,⁵ county, and city treasuries.⁶ Tourism has benefited, unemployment is down, a few lucky gamblers have made a great deal of money, and many retail businesses have prospered.⁷ On the negative side, personal bankruptcy is up, more Mississippians are becoming addicted to gambling, and crime is on the upswing.⁸ In some parts of the State the cost of living is on the rise, there are housing shortages, traffic problems have multiplied, drainage and sewage systems are strained, and social services are struggling to keep up with a growing homeless population.⁹ All the while the gaming industry is facing problems relating to over-saturation and is bracing for the impact of legalized gambling in neighboring states.¹⁰

⁵ In addition to increased tourism, employment, and business activity, Mississippi imposes an annual license fee of \$5000. *See* MISS. CODE ANN. § 75-76-183(2) (1991). This is in addition to a \$5000 application fee. *Id.* § 75-76-183(1). There is also a fee determined as a percentage of the amount of monthly gross revenues. *Id.* § 75-76-177(c). The State receives four percent of gross monthly revenues up to \$50,000; six percent for amounts between \$50,000 and \$134,000; and eight percent for amounts over \$134,000. *Id.* § 75-76-177(1). Mississippi also requires additional licensing fees, determined by the number of games offered for play. MISS. CODE ANN. § 75-76-191 (1991). Unlike many other states, Mississippi does not provide for the collection or imposition of an admission fee. James R. Swanson, Presentation at the Gaming Seminar, Tulane Law School (Sept. 8-9, 1994). *But see* MISS. CODE ANN. § 27-109-11(3) (1990) (imposing boarding fee of \$3.50 per person on cruise vessel in general, not just gambling vessels).

⁶ The locality where the ship is moored may impose a fee of 0.4% on gross monthly revenues up to \$50,000; 0.6% for amounts between \$50,000 and \$134,000; and 0.8% for amounts over \$134,000. MISS. CODE ANN. § 75-76-195 (1991); *see also* INTERNATIONAL CASINO LAW 78 (Anthony N. Cabot et al. eds., 1993) [hereinafter CASINO LAW] (explaining tax and fee system in Mississippi).

⁷ *See infra* notes 116-74, 182-207 and accompanying text.

⁸ *See infra* notes 267-390 and accompanying text.

⁹ *See infra* notes 391-441 and accompanying text.

¹⁰ *Weekend Edition: Biloxi, Mississippi, Enjoys Boom From Legal Gambling*, (National Public Radio broadcast, Mar. 20, 1994) [hereinafter *Weekend Edition*]. Louisiana will soon have a land-based casino in New Orleans, and Alabama officials are trying to get legalized gambling in their state. *Id.* Tourism officials in Mississippi, however, believe that their head start, combined with the other attractions Mississippi has to offer, will lead to continued growth. *Id.*

Despite the enormous profits, some residents and legislators are afraid that the State's rush to gambling was a mistake.¹¹ Biloxi and Harrison County approved gambling, but it required two votes and only passed with a 57.4% majority.¹² Many doubt that it would pass if put to a vote again.¹³ "[A] lot of [gambling supporters] are changing their tune."¹⁴ The questions to be answered, of course, are: Why might people be changing their minds? What can we expect in the future? How can the legal process effectively respond to the needs of the people as legalized gambling continues to play an increasingly important role in the lives of us all?

There are so many variables to examine, and the status of the industry is so fluid, that it is quite difficult to evaluate the impact that the gaming industry has had on Mississippi and other areas of the country. It is even more difficult to make projections about the future. Nevertheless, if we are to properly evaluate our public policy toward gambling, it is necessary to look at the ramifications of legalized gambling. Fortunately, we have a long history upon which to draw.

¹¹ See Bartholomew Sullivan, *Do Casinos Threaten Natchez's Charms of Time and the River?*, COM. APPEAL (Memphis), Aug. 1, 1994, at A1, A10 (explaining that some Natchez residents fear legalized gambling may be mistake); *The Gamble, Part 3 - Gaming in Mississippi* (CNN television broadcast, July 24, 1994) [hereinafter *The Gamble*] (talking with legislators who formerly supported gambling and now oppose it).

¹² Michael Beebe, *Biloxi Shows Benefits, Banes of Gambling; Boom Brings Changes*, BUFF. NEWS, July 17, 1994, at A1. Emily Senseney, who voted to approve gambling in Harrison County, cites the traffic as why she would now vote otherwise. *Id.* The four-lane Route 90 along the beach will be widened in some places to accommodate the traffic that has doubled since the casinos arrived. *Id.*

¹³ Beebe, *supra* note 12, at A1; see also Laurel S. Walters, *Casino Invasion Stirs Up Mississippi's Gulf Coast*, CHRISTIAN SCI. MONITOR, May 25, 1994, at 11. Mayor A.J. Holloway of Biloxi said that residents voted for legalized gambling, but "[t]hat was before it intruded on people's lives." *Id.* He also stated that he would not recommend any more zoning for gaming. *Id.*

¹⁴ Lonnie Williamson, *A Dicey Development*, OUTDOOR LIFE, Apr. 1994, at 44. Initially, hunters in the Tunica County area did not feel that casinos were a threat. *Id.* at 46. Since then, the editor of *Mid-South Hunting and Fishing News* has formed the Mississippi River Coalition to make sure that existing laws designed to protect wetlands are followed. *Id.*

II. A BRIEF HISTORY OF GAMBLING AND GAMBLING REGULATION

Gambling consists of three elements: consideration, chance, and reward.¹⁵ Lotteries are perhaps the best example of pure gambling. A typical lottery, which involves a person purchasing one or more chances to win a prize based on a random drawing, clearly involves all three elements. Consideration is found in the cost of the ticket. Tickets are randomly drawn, or numbers are randomly selected, rendering a result clearly based on chance. The reward is the prize that the lucky ticket holder will win.

Gambling is nearly as old as civilization itself. Various games of chance existed among ancient Egyptians, Chinese, Japanese, Hebrews, Greeks, Romans, and the early Germanic tribes.¹⁶ Excavations in London uncovered the remnants of a

¹⁵ See Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 556-58 (1990) (describing each element of gambling); see also Martin Fox, *DA Is Dealt a Defeat In Three-Card Monte*, NAT'L L.J., Aug. 29, 1994, at A23 (ruling three-card monte as game of skill and therefore not gambling). See generally Frank Garcia, *DON'T BET ON IT: THE REAL SECRETS OF 3 CARD MONTE* (1978) (revealing how "suckers" can never win at three-card monte).

¹⁶ See JOHN ASHTON, *THE HISTORY OF GAMBLING IN ENGLAND* 3-12 (Patterson Smith Publ. Co. 1969) (1889) (describing gambling practices through time); see also Howard J. Shaffer, *Conceptual Crises in the Addictions: The Role of Models in the Field of Compulsive Gambling*, in *COMPULSIVE GAMBLING: THEORY, RESEARCH, AND PRACTICE* 3, 4 (Howard J. Shaffer et al. eds., 1989) [hereinafter *COMPULSIVE GAMBLING*] (stating "[t]he Babylonians, Etruscans, and the ancient Chinese were among the first civilizations to participate in organized gambling"). A drawing found on the wall of a burial vault in Beni Hasan, Egypt (circa 2500 B.C.), shows what appears to be a ball hidden under one of several cups. MILBOURNE CHRISTOPHER, *THE ILLUSTRATED HISTORY OF MAGIC* 9-11 (1983). Magicians have speculated that this was an early magic trick. *Id.* I have previously speculated that this may have been an early record of gambling activity. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 15 (1992). It now appears that the drawing actually depicts a bread-making process. Chuck Romano, *The Art of Deception or the Magical Affinity Between Conjuring and Art*, 74 THE LINKING RING, Nov. 1994, at 59, 60. In Egypt, archaeologists recently discovered a bakery that dates back to the building of the pyramids. *Id.* This time period corresponds directly with that of the Beni Hassan tomb. *Id.* The archaeologists found bread molds and flat trays that almost certainly are what the drawing depicts. *Id.*

2000-year-old dice game.¹⁷ Perhaps more interestingly, "loaded" dice were found in the Pompeii excavation.¹⁸ In fact, some authorities have suggested that artifacts dating from the Stone Age were used for gambling.¹⁹

Governments have also been regulating gambling practically since its inception. Records from India indicate that in 321 B.C. there was a governmental department to regulate gambling, with a Superintendent of Public Games who supplied dice and collected a fee of five percent of the receipts.²⁰ In 1190, during the Crusades, Richard the First of England and Phillip of France issued joint regulations to control gambling in the Christian Army.²¹ In England alone, proclamations or legislative enactments designed to control gambling were set forth in 1388,²² 1477,²³ 1494,²⁴ 1503,²⁵ 1511,²⁶

¹⁷ Donna Foote, *A Treasure Hunt in London*, NEWSWEEK, Aug. 1, 1988, at 49. The dice game discovered in London was left by the Romans. *Id.*

¹⁸ E. BENSON PERKINS, *GAMBLING IN ENGLISH LIFE* 8 (1950). A tavern in Pompeii is decorated with an ancient painting of a quarrel breaking out between two men playing dice. *Id.* The final result is both men being pushed out of the establishment, presumably as a result of one man's cheating. *Id.*; see also Shaffer, *supra* note 16, at 5 (discussing early examples of excessive behavior associated with gambling).

¹⁹ GILBERT GEIS, *NOT THE LAW'S BUSINESS: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES* 226 (1979). Although Stone-Age people were known to have tossed painted pebbles and casted knucklebones, it is not certain that this was done as a means of gambling. *Id.* These activities may have been based on religious ceremony. *Id.*

²⁰ WILL DURANT, *OUR ORIENTAL HERITAGE* 444 (1954); see also Shaffer, *supra* note 16, at 9 ("Governments first attempted to control gambling as early as 300 B.C.").

²¹ This edict limited gambling based upon class distinction. 2 *A HISTORY OF THE CRUSADES* 60 (Kenneth M. Setton ed., 1962). Persons below the rank of knight were prohibited from playing any sort of game for money unless officers were present. *Id.* Knights and clergymen could play for money, but were not permitted to lose more than 20 shillings per day, under penalty of 100 shillings. *Id.* The two monarchs could play for any amount they pleased, but their attendants were restricted to the sum of 20 shillings. *Id.* If a soldier violated these rules, he was to be stripped naked and whipped through the army for three days; sailors found in violation were keel hauled for three days. *Id.* For a description of gambling games that were popular with soldiers during the Crusades, see THOMAS A. ARCHER & CHARLES L. KINGSFORD, *THE CRUSADES: THE STORY OF THE LATIN KINGDOM OF JERUSALEM* 284-90 (5th ed. 1919).

²² 12 Rich. 2, ch. 6 (1388) (Eng.).

²³ 17 Edw. 4, ch. 3 (1477) (Eng.).

1535,²⁷ 1541,²⁸ 1664,²⁹ and 1699.³⁰ Yet gambling continued to be a serious problem.³¹

In the seventeenth and eighteenth century, gambling among the British gentry was rampant.³² One commentator observed, "Unless one gambled freely it was quite impossible to be counted a gentleman, or, for that matter, a lady of fashion."³³ The large transfers of property that often accompanied this gambling disrupted England's land-based aristocracy.³⁴ Accordingly, in 1710, Queen Anne signed the Statute of Anne

²⁴ 11 Hen. 7, ch. 2 (1494) (Eng.).

²⁵ 19 Hen. 7, ch. 12 (1503) (Eng.).

²⁶ 3 Hen. 8, ch. 25 (1511) (Eng.).

²⁷ 27 Hen. 8, ch. 25 (1535) (Eng.).

²⁸ 33 Hen. 8, ch. 9 (1541) (Eng.).

²⁹ 16 Car. 2, ch. 7 (1664) (Eng.).

³⁰ Wm. 3, ch. 17 (1699) (Eng.).

³¹ For a discussion of these English statutes, see Rychlak, *supra* note 16, at 16-19.

³² The government's ability to regulate gambling had been severely limited by the decision in *The Case of Monopolies*, 77 Eng. Rep. 1260 (1602). That case held that all games were legal unless expressly made illegal by Parliament *Id.* at 1264. This meant that a slight modification to a prohibited game would make the game legal until Parliament was able to respond. Rychlak, *supra* note 16, at 17-20. With so many ways to gamble, and the numerous modifications that could be made to games once they were declared illegal, it was no longer realistically possible to outlaw gambling. *Id.* at 17. Instead, subsequent legislation, such as the Statute of Anne, was directed at controlling fraud and limiting the amounts that could be wagered. *Id.*

³³ CYRIL H. HARTMANN, INTRODUCTION TO GAMES AND GAMESTERS OF THE RESTORATION xi (F. Isaacs ed., 1930) (referring to court of Charles II, 1660-85); see also 1 ANDREW STEINMETZ, THE GAMING TABLE: ITS VOTARIES AND VICTIMS 16 (Patterson Smith Publ. Co. 1969) (1870) ("[T]here was no European nation among which gambling did not constitute one of its polite and fashionable amusements - with the exception of the Turks.").

³⁴ NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ADMINISTRATION-U.S. DEPT. OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 12, 15 (1977) [hereinafter DEVELOPMENTS]; see also 1 STEINMETZ, *supra* note 33, at 20 ("[S]ome have played first all their money, then their rings, coach and horses . . . and then, such a farm; and last, perhaps a lordship.") (citation omitted). Later, in the Old South of the United States, many plantations changed hands over poker games. HENRY CHAFETZ, PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955, 188 (1960); see also MARGARET MITCHELL, GONE WITH THE WIND 47-49 (Avon Books 1973) (1936) (explaining how Gerald O'Hara won Tara playing poker).

to stabilize British society by refusing to enforce large gambling debts.³⁵ Nevertheless, gambling continued, and like many other European governments, the English government conducted annual lotteries to raise revenue throughout much of the eighteenth and nineteenth centuries.³⁶

³⁵ I. NELSON ROSE, *GAMBLING AND THE LAW* 73 (1986). "The Statute of Anne was passed to protect the landed gentry from the consequences of their own folly." *Id.* Under the Statute of Anne, "all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever" given in payment of gambling debts of ten pounds or more were deemed "void, frustrate, of none Effect to all Intents and Purposes." 9 Anne, ch. 14, § 1 (1710) (Eng.). In addition, the loser of any sum over ten pounds could sue within three months to recover his loss, and if he did not sue, anyone could sue the winner for three times the amount lost. *Id.* § 2. One half of the amount recovered went to the Crown. *Id.* Persons convicted of fraud in gambling were subject to forfeiture of five times the sum won and to corporal punishment. *Id.* § 5.

Even with the restrictions imposed by the Statute of Anne, not all gambling was curtailed. Rychlak, *supra* note 16, at 19-20. The Statute of Anne did not affect gambling debts for less than ten pounds, which remained fully enforceable in court. *Id.* at 20. Nonetheless, by making large gambling debts unenforceable, the Statute of Anne had the desired effect of curtailing the large transfers of wealth and land that had taken place prior to its enactment. *Id.* As the New World developed, the Statute of Anne, along with other common law doctrines, became part of the law of every state in the United States. *Id.*

³⁶ DAVID WEINSTEIN & LILLIAN DEITCH, *THE IMPACT OF LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING* 8 (1974); see also 1 STEINMETZ, *supra* note 33, at 399-400 (referring to first parliamentary lottery in 1709). Shakespeare mentioned lotteries in several of his works. See WILLIAM SHAKESPEARE, *ANTONY AND CLEOPATRA* act 2, sc. 2, lines 247-48 (Sylvan Barnet ed., 1988) ("If beauty, wisdom, modesty, can settle the heart of Antony, Octavia is a blessed lottery to him."); WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 1, lines 118-19 (Sylvan Barnet ed., 1988) ("So let high-sighted tyranny range on, Till each man drops by lottery."); WILLIAM SHAKESPEARE, *TROILUS AND CRESSIDA* act 2, sc. 1, line 138 (Sylvan Barnet ed., 1988) ("I know not; 'tis put to lottery."); see also WILLIAM SHAKESPEARE, *CORIOLANUS* act 5, sc. 2, line 10 (Sylvan Barnet ed., 1988) ("[I]t is lots to blanks."). While the other Shakespearean references to lotteries might not indicate a gambling game, the phrase in *Coriolanus*, which means winning tickets to losing tickets or a better than even chance (a similar modern phrase would be "dollars to doughnuts"), seems clearly to indicate the type of lottery that European governments were then beginning to conduct. It is interesting to note that all of these references are in tragedies that date from 1599 to 1608, indicating that it was around this time that lotteries were becoming popular throughout England. See WILLIAM SHAKESPEARE, *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 770, 862, 1071, 1108 (Hardin Craig & David Begington eds., rev. ed. 1973) (discussing dates of various plays).

Gambling and the regulation of gambling also have long histories in this country. The Puritans drafted the earliest gambling regulations in the New World.³⁷ These laws were designed to attack the unproductive use of time—idleness, not gambling in and of itself.³⁸ “The instinct of the people for gambling was thought of as a natural one, and opposition to it was not strong or widespread.”³⁹ Idleness, however, was a great sin. Ben Franklin, who enjoyed playing cards,⁴⁰ once received a letter questioning this idle waste of time. He replied:

I have indeed now and then a little compunction in reflecting that I spend time so idly; but another reflection comes to relieve me, whispering, “*you know that the soul is immortal; why then should you be such a niggard of a little time, when you have a whole eternity before you?*” So, being easily convinced, and, like other respectable creatures, satisfied with small reason, when it is in favour of what I have a mind to, I shuffle the cards again, and begin another game.⁴¹

³⁷ DEVELOPMENTS, *supra* note 34, at 39-42.

³⁸ See Alfred N. King, *Public Gaming and Public Trust*, 12 CONN. L. REV. 740, 740 (1980) (“It is further ordered that noe pson howse holder or othr, shall spend his time idely or unppfitably under paine of such punishment as the court shall thinke meets to inflicte”) (citation omitted).

The early version of baseball also was restricted by regulations designed to prevent idleness. GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL* 295 (1990). Will suggests that baseball helped change the nation’s attitude about idleness by emphasizing the virtues of play. *Id.* at 307.

³⁹ HARRY B. WEISS & GRACE H. WEISS, *THE EARLY LOTTERIES OF NEW JERSEY* 10 (1966); see also G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 1015 n.430 (1978) (“Indeed, only after the Puritan Devines lost their political power did a biblical justification for antigambling legislation develop.”). The Catholic Church still does not view gambling as inherently wrong unless it involves the violation of moral norms. *Catechism Addresses Gambling*, MISS. TODAY, Oct. 28, 1994, at 6 (citing *Catechism of the Catholic Church*).

⁴⁰ See 2 W. BRUCE, *BENJAMIN FRANKLIN SELF-REVEALED* 21 (2d ed. rev. 1923) (“He was always ready for a friendly game of cribbage, cards or chess.”); see also DAVID LOUIS, 2201 FASCINATING FACTS 68 (1983) (describing Franklin as one of earliest printers of playing cards in New World).

⁴¹ Letter to Mrs. Mary Hewson (May 6, 1786) in 9 *THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN* 510, 512 (Albert H. Smyth ed., 1906) (emphasis in original).

When gambling could be put to a good use, the colonists were not reluctant to employ it. For instance, early Americans often relied on lottery proceeds to finance public works.

Because the colonies had no central government, hence no power to tax, they were at first dependent on help from England.⁴² In 1612, King James I chartered the Virginia Company of London to raise revenue for the benefit and support of the Jamestown settlement.⁴³ One authorized means of raising money was by conducting lotteries throughout England.⁴⁴ As one early American colonist noted, these lotteries were the "real and substantiall [sic] food, by which Virginia hath been nourished."⁴⁵ That nourishment, however, came at the expense of the British, who purchased the tickets but did not benefit from the profits. As such, they soon became a drain on the British economy.⁴⁶ When the Virginia Company's charter was revoked in 1624, colonists soon turned to domestic lotteries.⁴⁷

Between 1746 and the Civil War, American lotteries were authorized for such projects as the establishment or improve-

⁴² DEVELOPMENTS, *supra* note 34, at 660. Prior to 1790, business in America was still in its infancy. *Id.*

⁴³ VA. CHARTER of 1612, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 37, 44 (William F. Swindler ed., 1979) [hereinafter CONSTITUTIONS].

⁴⁴ A.R. SPOFFORD, LOTTERIES IN AMERICAN HISTORY, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173 (1893) [hereinafter SPOFFORD]. These lotteries were promoted as Christian endeavors, and two of the first three winning tickets were held by Anglican churches. GEORGE SULLIVAN, BY CHANCE A WINNER: THE HISTORY OF LOTTERIES 13 (1972); *see also* John Crigler et al., *Why Sparky Can't Bark--A Study of the Ban on Broadcast Advertisements*, 2 COMM. LAW CONSPECTUS 43, 46 (1994) (describing early Virginia lottery as respectable).

⁴⁵ JOHN S. EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 8 (1960) (quoting member of Virginia Company).

⁴⁶ *See* WEISS & WEISS, *supra* note 39, at 4 ("It did not take long for the [English] towns and cities to complain of the demoralization of business and industry by the competition of the lottery.").

⁴⁷ King, *supra* note 38, at 741. It has been suggested that most tickets in the early American lotteries were purchased by the gentry, who regarded participation in the lottery as a civic duty. *Id.* Early American lotteries operated differently than modern lotteries do. For a detailed explanation of the process, *see* SULLIVAN, *supra* note 44, at 17-18.

ment of Harvard, Yale, Kings College (Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina, and the University of Michigan; the benefit of the Masons; the fortification of New York City and Philadelphia; the construction of roads, hospitals, lighthouses, and jails; the promotion of literature; the improvement of navigation on rivers; the development of industry; and even the construction of churches.⁴⁸ During this period, lotteries provided funds to 47 colleges, 300 lower schools and 200 church groups (including most minor denominations and every major denomination except the Quakers).⁴⁹ The Continental Congress even authorized a national lottery to help fund the Revolutionary War.⁵⁰ By 1776, a lottery wheel existed "in every city and town large enough to boast of a courthouse and a jail."⁵¹

By the 1830s, most of the revolutionary era lotteries had been outlawed due to massive fraud and a perception that they eroded the moral fabric of the society.⁵² There was, however, a brief revival of state run lotteries in the late 1860s. Expenses stemming from the Civil War and Reconstruction created a great need for funds to finance government projects, primarily in Southern and Western states.⁵³ Mississippi's lottery of this

⁴⁸ Approximately 158 lotteries were chartered between 1744 and 1774. See DEVELOPMENTS, *supra* note 34, at 662-63 (identifying general nature of benefited entities). For citation to several of the acts authorizing these lotteries, see Rychlak, *supra* note 16, at 25 n.83.

The most interesting lottery from this time period (or any time period) may have been the proposed 1747 New York "Charitable Lottery" for virgins and widows, which would offer prizes ranging from "Beauties" and "Pretty girls" to "Good conditioned" and "Good card-players." CHAFETZ, *supra* note 34, at 24-25.

⁴⁹ JOHN DOMBRINK & WILLIAM THOMPSON, THE LAST RESORT: SUCCESS AND FAILURE IN CAMPAIGNS FOR CASINOS 8 (1990); see also HERBERT ASBURY, SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA FROM THE COLONIES TO CANFIELD 73-74 (Patterson Smith Pub. Co. 1969) (1938) (discussing various uses of early American lottery proceeds).

⁵⁰ See *Horner v. United States*, 147 U.S. 449, 458 (1893) (mentioning Revolutionary War era lottery). Few tickets were sold, and the lottery was ultimately declared a failure. CHAFETZ, *supra* note 34, at 25-26.

⁵¹ EZELL, *supra* note 45, at 53.

⁵² See Rychlak, *supra* note 16, at 32-38 (setting forth reasons for downfall of early American lotteries).

⁵³ WEINSTEIN & DEITCH, *supra* note 36, at 10. Often these lotteries appeared

era gained special recognition in that it ended up having its fate decided by the United States Supreme Court.⁵⁴ In 1867, the Mississippi Legislature passed an act incorporating the Mississippi Agricultural and Manufacturing Aid Society and granting that corporation the right to conduct lotteries within the State for twenty-five years.⁵⁵ Two years later a new state constitution was adopted. The new constitution declared that "[t]he legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold."⁵⁶ Acting pursuant to this constitutional mandate, the 1870 legislature passed an act prohibiting all lotteries within the State.⁵⁷ When the State sought to prohibit any further drawings of the previously authorized lottery, the corporation argued that contractual rights granted by the 1867 statute could not be abrogated by a later state constitution or legislation.⁵⁸

The unanimous opinion of the Supreme Court began by acknowledging that a charter to a private corporation falls under the protection of the Contract Clause.⁵⁹ The Court, however, also noted that unless a valid contract was entered into there would be nothing for the Contract Clause to protect.⁶⁰

disguised as gift companies in order to avoid legal difficulties. *Id.* These illegal lotteries were successful for several years but were eventually forced out due to pressure from all areas of the government. *Id.* at 11; see also COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 145 (1976) (discussing need for government regulation).

⁵⁴ See *Stone v. Mississippi*, 101 U.S. 814 (1879).

⁵⁵ Act of Feb. 16, 1867, ch. 256, 1867 Miss. Laws 349.

⁵⁶ MISS. CONST. art. XII, § 15 (1890) reprinted in 5 CONSTITUTIONS, *supra* note 43, at 389.

⁵⁷ *Stone*, 101 U.S. at 815 (citing "An Act Enforcing the Provisions of the Constitution of the State of Mississippi Prohibiting All Kinds of Lotteries within Said State and Making it Unlawful to Conduct One in this State").

⁵⁸ *Id.* at 816; cf. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 624 (1819) (holding state's interference with previously granted charter violates contract clause of United States Constitution); *State v. Hawthorn*, 9 Mo. 389, 396-97 (1845) (holding revocation of charter from previously authorized lottery violates contract clause of United States Constitution).

⁵⁹ *Stone*, 101 U.S. at 815.

⁶⁰ *Id.* at 817. The alleged contract allowed the company to sell subscriptions

Thus, "[w]hether the alleged contract exists . . . or not, depends on the authority of the legislature to bind the State and the people of the State in that way."⁶¹ Although the pre-1869 constitution did not prohibit the legislature from granting the right to conduct lotteries, "[a]ll agree that the legislature cannot bargain away the police power of a State."⁶² Without attempting to define the limits of the police power, the Court stated that all matters affecting the public health and public morals, including lotteries, were properly subject to regulation under state police powers.⁶³ Consequently, a contract by which the legislature purported to give up the right to regulate or prohibit a lottery was invalid and unenforceable.⁶⁴ As such, the lottery in question was prohibited by the new Mississippi constitution.⁶⁵

By 1878, all states except Louisiana prohibited lotteries, either by statute or constitution.⁶⁶ When Louisiana politicians were unwilling or unable to close down the lottery in that state, the federal government finally got involved and passed legislation that effectively killed that lottery as well.⁶⁷

which entitled the holder to a chance to win various valuable items. *Id.*

⁶¹ *Id.* The Legislature cannot impair its power to regulate such activities. *Id.*

⁶² *Id.*

⁶³ *Id.* at 818.

⁶⁴ *Stone*, 101 U.S. at 821. The Court stated that any company accepting a lottery charter must forfeit it when the people decide it is better for the public good. *Id.*

⁶⁵ Interestingly, the Mississippi Constitution still prohibits lotteries. MISS. CONST. art. IV, § 98 (1890). Thus, in permitting riverboat casinos, the Legislature had to define the Constitution in such a way as not to prohibit casino-style gambling. MISS. CODE ANN. §§ 75-76-3(6), 75-76-5(k) (1991). A similar situation in Missouri caused that state's supreme court to rule that Missouri riverboats could not offer games of chance, only games of skill. See *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 64 (Mo. 1994). In November, 1994, Missouri voters approved a provision which will permit games of chance to be offered. *Gaming Industry Wins Some, Loses Some in '94*, SACRAMENTO BEE, Dec. 18, 1994, at A3.

⁶⁶ WEINSTEIN & DEITCH, *supra* note 36, at 11. During this period, Delaware and Vermont recognized the right of their legislatures to authorize lotteries, but none were so authorized. H.R. REP. NO. 787, 50th Cong., 1st Sess. pt. 2, at 2 (1888).

⁶⁷ See Rychlak, *supra* note 16, at 40-44 (detailing problems and setting forth federal legislation).

From the turn of the century until the mid 1960s, there was fairly little legalized gambling and no state sponsored gambling in the United States.⁶⁸ Nevada, of course, was notorious for its legal gambling,⁶⁹ and some areas had parimutuel betting on race horses or greyhound dogs. Overall, however, legal gambling was at a historic low in this nation. Then, in 1964, more than a century after most states had banned all lotteries, New Hampshire reintroduced America to the state run lottery.⁷⁰ New York followed by introducing a lottery in 1967 and New Jersey introduced one in 1970.⁷¹ By 1974, eleven states were on the lottery bandwagon.⁷² In 1977, legal casino gambling came to Atlantic City, New Jersey.⁷³ As more and more states seek to take advantage of the enormous profits that can be derived from legalized gambling, new games, locations, and variations have swept across the nation.⁷⁴

Some form of legalized gambling is now found in every

⁶⁸ In 1910, a year in which New York outlawed gambling and Nevada banned casinos, "the nation became virtually free of legalized gaming." DOMBRINK & THOMPSON, *supra* note 49, at 11. A few states briefly experimented with legalized slot machines during this period. See Rychlak, *supra* note 15, at 562-63 (discussing projects in Florida and Maryland).

⁶⁹ Gambling was legalized in Nevada in 1931, but it really came of age in 1946 when Benjamin Siegal built the Flamingo Hotel just outside Las Vegas. JEROME H. SKOLNICK, *HOUSE OF CARDS: THE LEGALIZATION AND CONTROL OF CASINO GAMBLING* 109-11 (1978).

⁷⁰ See N.H. REV. STAT. ANN. §§ 287-F:1 to 287-F:19 (1987) (New Hampshire's lottery legislation).

⁷¹ CHARLES T. CLOTFELTER & PHILLIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 145 (1989); see N.J. STAT. ANN. §§ 5:9-1 to 5:9-25 (West 1988); N.Y. TAX LAW §§ 34-1600 to -1606 (McKinney 1987) (State Lottery for Education, which replaced earlier New York State Lottery); see also *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990, 991 (2d Cir. 1969) (discussing New York's adoption of lottery in 1966-67), *cert. denied*, 396 U.S. 1061 (1970).

⁷² WEINSTEIN & DEITCH, *supra* note 36, at 16.

⁷³ Joseph F. Sullivan, *As Casinos Profit, So Do Lawyers in a New Field*, N.Y. TIMES, Sept. 30, 1994, at A29.

⁷⁴ The Clinton Administration proposed (and then dropped) a four percent tax on the industry's gross revenue to finance changes in welfare. Sullivan, *supra* note 73, at B10. The newest proposals relate to interactive computer gambling. See Julie Schmitt, *Iacocca Bets In-Flight Gambling Will Take Off*, USA TODAY, Oct. 10, 1994, at B3 (discussing Lee Iacocca's venture capital group which seeks to place interactive gambling devices on airplanes).

state except Hawaii and Utah. As of mid-1994, lotteries were conducted in thirty-seven states and the District of Columbia;⁷⁵ twenty-four states had gambling on Indian reservations;⁷⁶ six states had riverboat gambling;⁷⁷ and twenty-three states had authorized casinos.⁷⁸ Other states have various forms of parimutuel betting or other licensed or state sponsored gambling.⁷⁹ In fact, casinos had ninety-two million visitors in 1993, twice as many as three years ago and more than admissions to major league baseball games.⁸⁰ Americans spent more than \$30 billion on games of chance in 1993, more than on films, books, recorded music and other entertainment combined.⁸¹ Whatever the form of the game,⁸² with this much

⁷⁵ Ian Brodie, *Tunica County Gets Lucky as Gambling Sweeps US*, THE TIMES (London) Apr. 11, 1994, at 38; see also *The Gamble, Part 1 -- A Fast-Growing Industry* (CNN television broadcast, Mar. 27, 1994) (discussing pros and cons of state lotteries).

⁷⁶ Sullivan, *supra* note 73, at A29.

⁷⁷ The six states that have riverboat gambling are Illinois, Indiana, Iowa, Louisiana, Mississippi and Missouri. See Illinois Riverboat Gambling Act, ILL. ANN. STAT. ch. 230, para. 10/1-10/23 (Smith-Hurd 1993 & Supp. 1994); Indiana Riverboat Gambling Statute, IND. CODE ANN. §§ 4-33-2-1 to 4-33-15-4 (Burns Supp. 1994); Iowa Excursion Boat Gambling Statute, IOWA CODE ANN. §§ 99F.1 to .18 (West Supp. 1994); Louisiana Riverboat Economic Development and Gaming Control Act, LA. REV. STAT. ANN. §§ 4:501-562 (West Supp. 1995); Mississippi Gaming Control Act, MISS. CODE ANN. §§ 75-76-1 to -281 (1991 & Supp. 1994); Missouri Excursion Gambling Boats Statute, MO. ANN. STAT. §§ 313.800 to .850 (Vernon 1994). Bills have also been proposed in Ohio, Pennsylvania, Texas, and Virginia. See H.R. 93, 120th Leg., Reg. Sess. (Ohio 1993); H.R. Res. 345, 178th Leg., Reg. Sess. (Pa. 1993); S. 1217, 73d Leg., Reg. Sess. (Tex. 1993); H.R. 1242, Virginia 1994-1995 Reg. Sess.

⁷⁸ Brodie, *supra* note 75, at 38 (including Indian reservation gambling). Not counting Indian reservations, there are now eleven states that have casinos. Laurel Campbell, *Casinos Hope Florida Votes Yes*, COM. APPEAL (Memphis), Nov. 6, 1994, at C1 (identifying ten states). Florida actually voted no in the November 1994 election, as did Wyoming, but Rhode Island voted to approve casino gambling. *Final Election Results*, USA TODAY, Nov. 10, 1994, at A10, A13. Gambling issues of one form or another appeared on ballots in 15 states in elections that month. *Id.*

⁷⁹ See *Riverboat Casinos Continue Economic Boom, Say Experts*, DAILY MISSISSIPPIAN, Sept. 27, 1994, at 1 (warning that boom will slow when other states attempt to mimic Mississippi).

⁸⁰ Brodie, *supra* note 75, at 38.

⁸¹ *Id.* By one report, \$394.3 billion was bet in this country in 1993. Sullivan, *supra* note 73, at A29 (citing GAMING AND WAGERING BUS. Magazine's annual

money at stake, it is clear that gambling will continue to be an important part of the political and economic landscape well into the future.⁸³

III. THE MISSISSIPPI APPROACH

Unlike the majority of states which looked first to lotteries as a "mild" form of gambling,⁸⁴ Mississippi opted for riverboat

survey on gambling).

⁸² One recent innovation is the video lottery. ROSE, *supra* note 35, at 2 (describing video as "[t]he latest thing in lotteries"). This lottery is played on machines similar to the video games teenagers play (like Pac Man), but the game is one of chance, not skill. Rychlak, *supra* note 16, at 247 n.235. With interactive television now on the horizon, this game might soon be available within the average home.

⁸³ See CLOTFELTER & COOK, *supra* note 71, at 9, 140 ("[I]n state after state the people have endorsed state-run lotteries in public referenda. Once in place, no lottery has yet been seriously challenged or threatened with termination."). In addition to being popular, gambling interests have also been willing to spend great sums to sway public opinion when there is a referendum. *Id.* at 141, 236.

Church groups, which tend to oppose gambling, rarely have the political clout to defeat movements toward gambling. *Id.* at 47, 174.

⁸⁴ See Pauline Yoshihashi, *Gambling: Luck is Running Out at Some Lotteries, As Competition and Boredom Take Toll*, WALL ST. J., Feb. 12, 1991, at B1, B6 (noting that some people fear that video gambling blurs "the line between traditional lotto and 'hard' gambling"). But see *Stone v. Mississippi*, 101 U.S. 814, 818 (1879). In *Stone* the Court stated:

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.

Id. at 818 (quoting *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850)); *Champion v. Ames*, 188 U.S. 321, 356 (1903) (quoting same language); *Lee v. City of Miami*, 163 So. 486, 489 (Fla. 1935) (adopting "widespread pestilence" definition); *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 61 (Mo. 1994) (recognizing lotteries as being more dangerous than other forms of gambling); *Ex Parte Pierotti*, 184 P. 209, 210-11 (Nev. 1919) (adopting "widespread pestilence" definition); *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 492-93 (N.J. 1955) ("Of all the forms of gambling, lotteries have been the most condemned by the courts. Over a century ago the United States Supreme Court unanimously condemned their anti-social effects in comparison with ordinary gambling. . . ."); see also Rychlak, *supra* note 16, at 60-63 (arguing that lotteries force states to promote gambling, thereby magnifying adverse social consequences).

gambling.⁸⁵ This was likely based on a romanticized perception of riverboat gamblers on the Mississippi River during the 1800s. An author wrote in 1870:

The town of Vicksburg, on the Mississippi, was formerly notorious as the rendezvous of all sorts of desperadoes. It was a city of men; you saw no women, except at night; and never any children. Vicksburg was a sink of iniquity; and there gambling raged with unrestricted fury. It was always after touching at Vicksburg that the Mississippi boats became the well-known scene of gambling—some of the Vicksburghers invariably getting on board to ply their profession.⁸⁶

As suggested by this passage, the time period when gambling was rampant on the Mississippi was violent, dangerous, and not at all romantic.⁸⁷

Casino-style gaming came to Mississippi on December 19, 1987, aboard the *Europa Star*, a cruise ship docked in Biloxi that sailed into waters where its operators claimed Mississippi had no jurisdiction and, thus gambling could take place.⁸⁸ The water in question was ultimately determined to be under Mississippi jurisdiction,⁸⁹ but in 1989 Mississippi became the first

⁸⁵ Iowa started the move toward riverboat gambling in 1989 when that state's legislature authorized low-stakes (\$5.00 per hand and a maximum loss per player of \$200 per riverboat trip) gaming on riverboats. CASINO LAW, *supra* note 6, at 1. Illinois then gave its riverboats an advantage by allowing high-stakes games in January, 1990. *Id.* Mississippi legalized high-stakes riverboat gaming on March 23, 1990. *Id.* In 1994, the Iowa statute was amended to remove the low-stakes restrictions, but the amendments are subject to approval in local referenda. *Id.*

⁸⁶ 1 STEINMETZ, *supra* note 33, at 249.

⁸⁷ See generally ASBURY, *supra* note 49, at 203-61 (discussing cheating, riots, murders, and reactions of concerned citizens trying to restore order).

⁸⁸ CASINO LAW, *supra* note 6, at 65. The *Europa Star* conducted "cruises to nowhere" and afforded passengers the opportunity to play slot machines, roulette and bingo. *Id.*

⁸⁹ *Id.* The *Europa Star* conducted its cruises in the Mississippi Sound, a channel between the coast of Biloxi and the barrier islands located eight to ten miles offshore from Biloxi. *Id.* The ship operators claimed that the Panamanian-registered vessel was in international waters and free from United States and Mississippi law when it was three miles out to sea from the Biloxi shore. *Id.* The State disputed the three mile jurisdictional limit and filed anti-gambling charges against the ship operators. *Id.* The courts ruled that international waters began beyond

state to allow gambling aboard cruise ships in state waters provided the ships were in transit to or from international waters.⁹⁰ The following year the State repealed the 1989 statute and passed much more comprehensive legislation which created a state gaming commission⁹¹ and legalized dockside gambling aboard approved vessels of a minimum size while in state waters.⁹²

The approved vessels are called "riverboats," but that term is misleading.⁹³ In Mississippi, a "cruise vessel" is defined as "a vessel which complies with all U.S. Coast Guard regulations, having a minimum overall length of one hundred fifty (150) feet and a minimum draft of six (6) feet which is certified to carry at least two hundred (200) passengers."⁹⁴ The general prohibitions on betting, gaming, or wagering do not apply when gambling takes place on a cruise vessel which

is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming, or

the barrier islands in the Gulf of Mexico. *Id.* The Europa Star ultimately left the State in November, 1988. *Id.* Its owners claimed it was not commercially viable to continue its Mississippi cruises with gaming permitted only after the ship was beyond the Sound. *Id.*

⁹⁰ Ships capable of carrying 400 passengers overnight could now offer gaming in Mississippi waters if they were at least 300 feet long and had a minimum draft of 15 feet. MISS. CODE ANN. § 97-33-1 (Supp. 1989), *amended by* MISS. CODE ANN. § 97-33-1(a)-(c) (Supp. 1990). The ships would still have to go into international waters, but gaming could begin when the ships left their Mississippi ports. *Id.* § 97-33-1(a)-(c).

⁹¹ MISS. CODE ANN. §§ 75-76-1 to -281 (1991). The Mississippi Gaming Commission is specifically created by MISS. CODE ANN. § 75-76-7(2) (1991).

⁹² MISS. CODE ANN. § 97-33-1 (1994).

⁹³ Many states have restrictions, not present in Mississippi, on the appearance of their riverboat casinos, requiring them to resemble 19th century riverboats. *See, e.g.,* ILL. ANN. STAT. ch. 230, para. 10/6(f) (Smith-Hurd 1993) (mandating that ships be either 19th century replicas or casino cruise ship design); IND. CODE ANN. § 4-33-6-6(b) (Burns Supp. 1994); IOWA CODE ANN. § 99F.7(3) (West Supp. 1994); LA. REV. STAT. ANN. § 4:504(23)(d) (West Supp. 1994).

⁹⁴ MISS. CODE ANN. § 27-109-1(2) (1990).

wagering on cruise vessels.⁹⁵

In addition, a "vessel" is defined as "a vessel having a minimum overall length of one hundred fifty (150) feet."⁹⁶ The general prohibitions on betting, gaming, or wagering do not apply when gambling takes place on a vessel which

is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming, or wagering on vessels.⁹⁷

Thus, as long as the voters within a qualified county do not disapprove, gambling can take place on a vessel or a cruise vessel.

Unlike every other state except Louisiana,⁹⁸ the Mississippi statute is worded so that riverboat gaming is legal in all the qualified counties, unless the voters of a county take affirmative steps to block it.⁹⁹ The voter disapproval provision works as follows. When an applicant files an application for a state gaming license to conduct gambling on a vessel or cruise vessel, notice must be published in a newspaper of general circulation, and objections may be filed within thirty days. If twenty percent of the registered voters or fifteen hundred people, whichever is less, sign a petition, then an election must be scheduled to determine whether that county will allow gambling.¹⁰⁰ If a vote takes place and the voters disapprove of gambling, a new

⁹⁵ MISS. CODE ANN. § 97-33-1(a) (1994).

⁹⁶ MISS. CODE ANN. § 27-109-1(2) (1990).

⁹⁷ MISS. CODE ANN. § 97-33-1(b) (1994).

⁹⁸ Swanson, *supra* note 5. Most states provide for some form of local option elections before gambling boats may be allowed to dock in a city or county, but it is usually a matter of voter approval, not voter disapproval. *Id.*; see, e.g., IOWA CODE ANN. § 99F.7(1) (West Supp. 1994) (authorizing issuance of gambling license only if county voters approve).

⁹⁹ MISS. CODE ANN. § 19-3-79 (Supp. 1994). The notice must be published within 10 days of the application, and if no petition is filed within 30 days after the required third publication then gaming is considered approved. *Id.* § 19-3-79.

¹⁰⁰ *Id.* § 19-3-79(3).

election may not be scheduled for one year.¹⁰¹ Once a casino is docked in a county, either without a petition and election or with an affirmative vote for the docking of a casino, no other election is to be held in that county.¹⁰² In the fourteen counties on the Mississippi River and Gulf Coast where casinos are sanctioned, voters by mid-1994 had ratified casinos in nine counties and defeated the proposal in two.¹⁰³

The original rationale for confining gambling to the water was that it would limit the impact on local communities while gambling would still be accessible.¹⁰⁴ In addition, if casinos did not succeed, they could pull anchor and sail away without leaving empty buildings behind.¹⁰⁵ Another concern expressed was that inland casinos would cause too much congestion and disruption in nearby residential areas.¹⁰⁶ With the economic boom experienced by some counties, there is already pressure to drop the waterborne requirement altogether.¹⁰⁷

Casino builders have been very inventive as they have tried to meet the requirement that casinos be on the Coast, the Mississippi River, or on navigable waters with access to those

¹⁰¹ *Id.* § 19-3-79(4).

¹⁰² *Id.* § 19-3-79(5).

¹⁰³ Ernest Blum, *Mississippi Tourism Hits Jackpot With Casinos (Tunica County)*, TRAVEL WKLY, Mar. 28, 1994, at 1. On December 4, 1990, 51% of Harrison County voters and 61% of Jackson County voters rejected floating casino-style gambling, while 51% of Hancock County voters approved it. Richard J. McLaughlin & Lonnie T. Cooper, *The Impact of Legalized Dockside Gaming on Mississippi Coastal Management Agencies*, 14 WATER LOG, No. 3, at 12 (1994). Harrison County citizens voted again in 1992 and approved dockside and cruise ship gambling for Gulfport and Biloxi. *Id.*

¹⁰⁴ Blum, *supra* note 103, at 1. Mississippi has regulations which, unlike other states with riverboat gambling, allow the casinos to be located on stationary dockside platforms rather than waterborne which increases accessibility. *Id.*

¹⁰⁵ Beebe, *supra* note 12, at A1. This could be viewed as a benefit or a detriment. *Id.* In Fort Madison, Iowa, the city borrowed \$2.2 million for waterfront improvements, then the boat left for Biloxi. *Id.* The city is suing the boat's owner. *Id.*

¹⁰⁶ McLaughlin & Cooper, *supra* note 103, at 12-13.

¹⁰⁷ Curtis Wilkie, *Casinos Raise Money, Doubts in Mississippi*, BOSTON GLOBE, Jan. 30, 1994, at 1, 14. Recently, State Sen. David L. Jordan of Greenwood promoted legislation to open up gambling in landlocked counties across the State. *Id.* The Silver Star casino, operated by the Choctaw Indians, is land based. *See infra* notes 184-207 and accompanying text.

water bodies. "The definitions [structuring the waterborne requirements] were written loosely and the developers have exploited every ambiguity" in the law.¹⁰⁸ Most of the casinos in Tunica County are miles from the Mississippi River. Jim Hasslocher, a former Navy Seabee engineer, came up with the plan which has been copied by most casino builders in that area.¹⁰⁹ Developers dredge a channel from the river or the Coast into the flood plain, fill it by pumping water in or by relying on flood waters, then float in barges, close off the channel, and build a casino on and around the barges.¹¹⁰ While they qualify as vessels, they have no engine, no wheelhouse, and there is no truly navigable water.¹¹¹

Interestingly, only the gambling equipment needs to float, other parts of the casino can be on dry land.¹¹² The "floating" casinos often have more square footage on land than on water.¹¹³ In fact, most of the casinos in Tunica "look about as seaworthy as Sears Tower."¹¹⁴ Tunica County's only true riverboat, the President, closed in the summer of 1994 because it lost too much business to the barges.¹¹⁵

The impact of these barges is much more significant than that which may have come to mind when people originally envisioned and approved riverboat gambling. To consider an example, plans for the Sheraton Tunica Corporation call for barges supporting a 91,900 square-foot casino, but the land-

¹⁰⁸ Wilkie, *supra* note 107, at 14 (quoting Wilson Carroll, director of the Mississippi Casino Operators Association).

¹⁰⁹ Wes Smith, *A Winning Hand: A Poor Delta Town Floats High on Gambling's Inflating Tide*, CHI. TRIB., June 30, 1994, § 5 at 1.

¹¹⁰ Smith, *supra* note 109, at 1. By following this development plan, casino owners are technically able to comply with the State's requirement that the casinos be located on the Mississippi River or navigable water with access to the river. *Id.*

¹¹¹ Wilkie, *supra* note 107, at 14. According to Wilkie, the "boats" are "huge buildings erected on barges floating on man-made ponds." *Id.*

¹¹² Rob Karwath, *On Riverboats, The River is Almost Ignored*, CHI. TRIB., June 5, 1994, § 2, at C1.

¹¹³ Walters, *supra* note 13, at 11. Often the bulk of the facilities of a casino includes restaurants and offices, both of which may be on dry land. *Id.*

¹¹⁴ Smith, *supra* note 109, at 1.

¹¹⁵ Litvin, *supra* note 4, at A8.

based portion part of the complex will consist of a 45-acre parking lot for 4000 vehicles, a four lane divided highway, and a ten-acre lake, among other facilities.¹¹⁶ According to company figures, Sheraton will spend more than \$200 million building the casino.¹¹⁷ The casinos will also contribute in excess of \$20 million per year into the state and county tax coffers. The vision of gentlemen playing poker on a paddleboat steaming up the river bears little resemblance to the floating casinos along the Coast and in Tunica County today.

IV. GAMBLING AS A MEANS TO GENERATE REVENUE

The modern state's reason for permitting gambling to take place is to increase state revenue.¹¹⁸ Gambling is a popular source of revenue because, unlike taxes, participation is voluntary.¹¹⁹ Ideally, a source of revenue should be predictable, in-

¹¹⁶ Williamson, *supra* note 14, at 46. In addition, ultimately the complex is intended to include a hotel with 300 rooms, a dance hall, restaurants, retail outlets and administrative offices. *Id.*

¹¹⁷ *Id.* Once completed, the development will provide 2000 jobs with a yearly payroll of approximately \$46 million, and an additional 1000 jobs will also be generated due to indirect impacts. *Id.*

¹¹⁸ See DOMBRINK & THOMPSON, *supra* note 49, at 176 (suggesting that different motivations—personal liberty and inability to enforce vice laws—had once been dominant).

¹¹⁹ Thomas Jefferson is often cited as having favored lotteries because he called it a tax "laid on the willing only." 17 THE WRITINGS OF THOMAS JEFFERSON 450 (Andrew A. Lipscomb ed., 1903). However, at that time, Jefferson was lobbying for special treatment and actually had expressed dislike for lotteries earlier in his life. THOMAS JEFFERSON, WRITINGS 1222 (Merrill D. Peterson ed., 1984). Jefferson once refused an offer to become a lottery agent, stating he had "made it a rule never to engage in a lottery." *Id.*

In his later years, Jefferson fell on hard times and owed \$80,000 to his creditors. ASBURY, *supra* note 49, at 74. Other than Monticello itself, the lands around it were his most valuable assets, but he was unable to find an individual buyer willing or able to pay his asking price. *Id.* Accordingly, he sought permission to conduct a lottery with the grand prize being some of the real estate surrounding Monticello.

The nation had only recently weaned itself from reliance on lotteries, and Jefferson's early efforts to obtain approval were met with defeat. SARAH N. RANDOLPH, THE DOMESTIC LIFE OF THOMAS JEFFERSON 413-14 (1978). The pain of this early rebuke was evident when he wrote:

It is a part of my mortification to perceive that I had so far overvalued

expensive and easy to collect, and should not place a disproportionate burden on the poor. Gambling has raised enormous amounts of money and has eased the burden on state taxpayers. Gambling has not, however, proved to be an ideal source of revenue.

When the Mississippi Legislature approved the casino bill, economists predicted modest returns.¹²⁰ Those projections have been far surpassed. Statewide, casinos netted \$428 million in revenue in fiscal 1993, the first full calendar year of casino operation in Mississippi.¹²¹ That number is expected to continue to climb.¹²² This revenue impacted tremendously on the State's fiscal situation. In 1993, casino gambling generated \$100 million in taxes for state and local government in Mississippi,¹²³ and the state budget surplus grew to more than \$300 million.¹²⁴ According to officials at the Mississippi Department of Economic & Community Development, gaming was responsible for approximately thirty-five percent of the sur-

myself as to have counted on [approval of the lottery] with too much confidence. I see, in the failure of this hope, a deadly blast of all my peace of mind during my remaining days. . . . I am overwhelmed at the prospect of the situation in which I leave my family.

Id. at 415 (quoting letter written by Jefferson). His supporters, however, were able to give Jefferson a gift of \$16,500, which relieved his immediate needs. ASBURY, *supra* note 49, at 75. Approval was ultimately attained, but the drawing did not take place until after Jefferson's death. SPOFFORD, *supra* note 44, at 188. By then debts had mounted, interest in the lottery had waned, and Monticello itself had to be included among the prizes. *See* NILES' WKLY. REGISTER (Baltimore), July 29, 1826, reprinted in ASBURY, *supra* note 49, at 75. Even with this new grand prize, lottery proceeds were insufficient to cover Jefferson's debts. *Id.* at 76. His remaining estate was disposed of in a forced sale. *Id.* "Happily, he died unconscious that the sales of his property would fail to pay his debts, that his beautiful home would pass into the hands of strangers, and that his 'dear and beloved daughter' would go forth into the world penniless. . . ." RANDOLPH, *supra*, at 418. The Legislatures of Virginia and South Carolina each later made gifts of \$10,000 to Jefferson's daughter. ASBURY, *supra* note 49, at 76.

¹²⁰ Wilkie, *supra* note 107, at 14.

¹²¹ Alan Salomon, *Gambling is Winner for Mississippi*, ADVERTISING AGE, July 18, 1994, at 10.

¹²² Salomon, *supra* note 121, at 10.

¹²³ *The Gamble*, *supra* note 11.

¹²⁴ Salomon, *supra* note 121, at 10. In 1993, the budget surplus increased for the second consecutive year. *Id.*

plus.¹²⁵ The Mississippi budget also saw a nineteen percent increase in spending, fueled largely by casino gambling.¹²⁶

According to some economists, Mississippi is now the number two state in the sunbelt in terms of economic outlook.¹²⁷ The gaming industry has brought new life to Mississippi's industry.¹²⁸ Unemployment in the state is at a twenty-two year low.¹²⁹ According to officials at the Mississippi Department of Economic & Community Development, gaming represented twenty-five to thirty-three percent of the new jobs created in the State during 1993.¹³⁰ Officials estimate that the legalization of gaming has created over 12,000 jobs in Mississippi as of March 1994,¹³¹ and with each casino employing about 1000 personnel and with 4000 new construction jobs,¹³² it is projected that the gaming industry will have created 37,000 new

¹²⁵ *Id.* At least one national publication has credited Governor Kirk Fordice's spending reductions and opposition to tax increases for the surplus. See *The Week*, NAT'L REV., Apr. 4, 1994, at 10, 12.

¹²⁶ *Gambling in America: Coming Soon Near You? It's a Safe Bet*, American Political Network, Apr. 13, 1994, available in LEXIS, Legis. Libr., APN File [hereinafter *Safe Bet*].

¹²⁷ Salomon, *supra* note 121, at 10. According to the Federal Reserve Bank of Atlanta, gambling has been the primary force in Mississippi's improved economic outlook. *Id.*

¹²⁸ Blum, *supra* note 103, at 1. In only 18 months, tourism has increased its economic impact from \$1.2 billion to \$3.5 billion. *Id.*

¹²⁹ Leslie A. Williams, *State's Jobless Rate Dips*, CLARION-LEDGER (Jackson, Miss.), Oct. 27, 1994, at A1. The jobless rate for November, 1994 was 5.3% which was the lowest since September, 1972 when it was 3.6%. *Id.* The U.S. rate is 5.6%, and Mississippi had dropped below that in September, 1994. *Id.*

¹³⁰ Salomon, *supra* note 121, at 10. Of course, it has been pointed out that job creation alone might not be sufficient justification for legalized gambling. One author noted:

Ten thousand . . . construction jobs are supposed to be created by this project. This may very well be true. However, we could create plenty of construction (and permanent) jobs by building brothels and opium dens. If job creation is the aim of local government, why hasn't the mayor proposed such a project?

John W. Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 DRAKE L. REV. 51, 54 (1994) (quoting Mark M. Quinn, *Social Costs of Casino Proposal Are Too High*, CHI. SUN-TIMES, Apr. 4, 1992, at 16).

¹³¹ *Weekend Edition*, *supra* note 10. The jobs created range from dealers and waitresses in the casinos to security personnel and construction workers. *Id.*

¹³² Wilkie, *supra* note 107, at 14.

jobs by the end of the fiscal year 1994 while adding \$130 million to the State's general fund.¹³³

The economic impact of gambling in Mississippi has been statewide, but there are regional differences. Retail sales in 1993 were up across the state, but were especially strong in the areas that have gambling. There was a fifteen percent increase in sales on the Gulf Coast, a thirteen percent increase in the northwestern corner of the state, and in the northeastern corner of the state, where there is no gaming, sales were up eleven percent.¹³⁴ Banks from both Jackson and Memphis are trying to move into the new gambling economies.¹³⁵ Tunica County has received most of the attention, but Harrison County, on the Gulf Coast, has also undergone a great deal of casino development. In order to get a better picture of the economics of casino gambling, it is wise to look at some of the specific areas where casinos are located.

V. TUNICA COUNTY

In 1982, the United States Department of Commerce identified Tunica County as the poorest county in the nation.¹³⁶ The Reverend Jesse Jackson once proclaimed Tunica as "America's Ethiopia."¹³⁷ In 1992, both presidential candidates visited the county to witness rural poverty at its worst.¹³⁸ Its

¹³³ *Id.* (citing report by Mississippi Center for Policy Research and Planning).

¹³⁴ Salomon, *supra* note 121, at 10. One might use the 11% figure as a background against which to measure the impact of casino gambling on economic activity. On the other hand, it may be that gambling had an impact on the economic activity even in those regions where there is no gambling. In that case, an 11% background would under-estimate the impact that casinos have had on economic activity.

¹³⁵ *1st Tennessee Buying Bank in Casino Town*, AM. BANKR., Mar. 30, 1994, at 2. First Tennessee National Corporation of Memphis purchased the Planter's Bank of Tunica as part of a "flurry of acquisition activity" set off by the growth of the casinos. *Id.*

¹³⁶ Salomon, *supra* note 121, at 10.

¹³⁷ Smith, *supra* note 109, at 1; see also David Snyder, *Tunica Trades its Rags for Riches*, TIMES-PICAYUNE (New Orleans), Feb. 20, 1994, at A1, A8 (discussing deplorable conditions of Tunica's "Sugar Ditch").

¹³⁸ Snyder, *supra* note 137, at A8. Before the casinos arrived, Tunica was only known as Sugar Ditch to outsiders. *Id.* Today, the Sugar Ditch shacks are gone.

notoriety as an impoverished area was even acknowledged by John Grisham in one of his works of fiction.¹³⁹ Today the situation has changed dramatically.

In 1993, Tunica casinos attracted 1.7 million tourists who contributed in excess of \$140 million to the local economy.¹⁴⁰ On weekends, over 50,000 people per day visit the Tunica County casinos to gamble.¹⁴¹ By the end of 1994, Tunica County had twelve casinos and employed about 13,500 workers.¹⁴² Land values have increased from \$500 an acre to \$50,000 an acre,¹⁴³ and some land has been sold for more than \$160,000 per acre.¹⁴⁴ Unemployment and illiteracy, estimated at seventy percent before casinos, spanned generations in a town dependent on farming for survival.¹⁴⁵ Unemployment might even have been higher, but thousands moved away as the county population dropped from 28,000 to 8000 over the course of about thirty years.¹⁴⁶ Many county residents had never held a full-time job.¹⁴⁷

Since casinos have come, unemployment has dropped to virtually zero. In fact, there are now more jobs than there are available workers in Tunica.¹⁴⁸ The median family income of

Id. In their place are brick public housing apartments. *Id.* One formerly unemployed resident now working for Splash Casino said delightedly, "I just bought a new house. Everything is positive." *Id.*

¹³⁹ JOHN GRISHAM, *THE CHAMBER* 63 (1994). Adam Hall, Grisham's fictional character, "listened to an old Muddy Waters cassette as he entered the infamous county of Tunica, said to be the poorest in the nation." *Id.*

¹⁴⁰ Helene Cooper, *Mixed Blessing*, WALL ST. J., June 22, 1994, at A1.

¹⁴¹ Wilkie, *supra* note 107, at 14.

¹⁴² GAMING REPORT, *supra* note 4, at 34.

¹⁴³ Wilkie, *supra* note 107, at 14.

¹⁴⁴ Smith, *supra* note 109, at 1.

¹⁴⁵ Snyder, *supra* note 137, at A8.

¹⁴⁶ Snyder, *supra* note 137, at A8. According to Tunica's mayor, the town was simply "drying up" with no end in sight to the stream of residents leaving to find a better future. *Id.*

¹⁴⁷ Snyder, *supra* note 137, at A8. Before the casinos, Tunica residents often worked part-time minimum wage jobs to survive. *Id.*

¹⁴⁸ *The Gamble*, *supra* note 11. One Tunica businessman has been unable to hire enough new workers to extend his operating hours because of all the jobs available. *Id.*

\$7600 has tripled.¹⁴⁹ The number of food stamp recipients has dropped by more than 1000.¹⁵⁰ At the Planters Bank in Tunica, deposits have increased twenty-five percent since gambling was introduced.¹⁵¹ Those who once struggled on minimum wage now have their choice of good jobs offering competitive salaries and full benefits.¹⁵² Additionally, jobs created by the casinos have helped other businesses increase sales, magnifying the impact of the casinos.¹⁵³

The financial benefit to the county government is projected to double in fiscal 1994, when a tax based on a percentage of the gambling revenues replaces the current boarding fee arrangement.¹⁵⁴ The county budget has already quadrupled due to the increased tax revenue,¹⁵⁵ and it may soon have an additional \$40 million per year to add into its budget.¹⁵⁶ Twenty percent of the county's gambling revenue is earmarked for Tunica's education system, which had been placed on financial probation by the State due to its desperate need for funding.¹⁵⁷

The town of Tunica receives no money directly from the casinos, but the indirect effects, such as increased sales tax

¹⁴⁹ Brodie, *supra* note 75, at 38.

¹⁵⁰ Snyder, *supra* note 137, at A8.

¹⁵¹ Wilkie, *supra* note 107, at 14.

¹⁵² *Weekend Edition*, *supra* note 10.

¹⁵³ Thomas Swick, *For Better or Worse: Mississippi's Casino Boom May Be a Bust for its Old South Charm*, CHI. TRIB., June 12, 1994, § 12 at C7. One business owner summed up the impact by saying that now people have "more money than time" and so business has improved. *Id.*

¹⁵⁴ Snyder, *supra* note 137, at A8. Tunica County presently receives approximately \$12 million per year from the casinos. *Id.*

¹⁵⁵ Wilkie, *supra* note 107, at 14. The economic strides made by Tunica County are so impressive that other predominantly Southern Baptist towns have taken notice. *Id.* Mayor Don Brasfield of Aberdeen, a town of approximately 7000 located on the Tennessee-Tombigbee waterway, told a hearing in Jackson, Mississippi, that he now was forced to consider gambling as a possible source for revenue. *Id.*

¹⁵⁶ Snyder, *supra* note 137, at A8. The increase in Tunica County's assets are amazing to residents and government officials alike, but the money is much needed to remedy long-standing problems in the impoverished county. *Id.*

¹⁵⁷ *Id.* But see Rychlak, *supra* note 16, at 51-54 (arguing that earmarking is unwise approach for dealing with gambling proceeds).

receipts, have been marked.¹⁵⁸ The town plans to use the increased flow of revenue to construct a new municipal building, grant county employees a raise, and improve law enforcement with increased funding for the sheriff's department.¹⁵⁹ Before the first casino opened, Tunica had gone nine years without building a new home.¹⁶⁰ Now there is tremendous construction activity, with construction crews working long hours to complete an estimated \$3 billion in construction.¹⁶¹ At a cost of millions of dollars, casino developers are even working on a project to build a private access road to provide a shorter route from nearby Memphis.¹⁶²

This growth has come at an unprecedented pace. Not long ago, Tunica County had no functioning hotel.¹⁶³ Tunica still does not have a permanent police department, and the mayor's office is in his furniture showroom.¹⁶⁴ According to Tunica Mayor, Bobby E. Williams, "It's taxing everything we've got, but it hurts so good."¹⁶⁵

VI. BILOXI AND THE GULF COAST

In 1991, Biloxi was six months behind on its bills and nearly bankrupt.¹⁶⁶ In the first two years of legalized gambling, the city received approximately \$25 million in new reve-

¹⁵⁸ Snyder, *supra* note 137, at A8.

¹⁵⁹ *Id.* One of the hotels in Tunica is doubling its capacity only six months after opening. *Id.* Also, both banks have remodeled. *Id.*

¹⁶⁰ *Id.* Today, housing and rental property are scarce. *Id.* Homes that were at one time rented for \$100 per month now command in the neighborhood of \$400. *Id.*

¹⁶¹ Smith, *supra* note 109, at 1. Estimates are that over 4000 workers spend 12 hours per day working on casino-related construction. *Id.*

¹⁶² Wilkie, *supra* note 107, at 14. The current route to Tunica from Memphis, where many workers live, is a two-lane road. *Id.*

¹⁶³ Blum, *supra* note 103, at 1. A full-scale resort, complete with two golf courses and two hotels with over 2000 rooms is reported to be in the plans of three companies. *Id.*

¹⁶⁴ *The Gamble, supra* note 11.

¹⁶⁵ Smith, *supra* note 109, at 1. Tunica is "probably going from being the poorest county in the United States to one of the richest in a few years." *Id.*

¹⁶⁶ Beebe, *supra* note 12, at 1. Biloxi was trying to survive as a "low-rent vacation resort" with serious money problems. *Id.*

nues.¹⁶⁷ A report from the Harrison County Development Commission for the 1993 fiscal year concluded that gambling has provided economic stimulus "unequaled in modern times."¹⁶⁸ According to the Casino Operator's Association, the casino industry produced approximately \$86 million per casino in total capital investments in the Gulf Coast economy in 1994.¹⁶⁹

With 2000 new hotel rooms being built along Biloxi's casino row, local water and sewer systems are overtaxed, but the city now has new money to pour into infrastructure improvements.¹⁷⁰ Harrison County officials report that gaming has already produced a ten percent increase in the number of jobs there and a twenty-eight percent increase in gross sales tax collections.¹⁷¹ Additionally, unemployment in Biloxi has been cut in half.¹⁷² The effect on jobs, however, is not limited to the casino employees. For example, after local banks began losing their tellers to the better-paying casino jobs, the banks were forced to raise their salaries.¹⁷³ Fishermen and some small businesses are suffering due to competition and loss of dock space,¹⁷⁴ but in terms of the general economy, Biloxi seems to be prospering.

¹⁶⁷ *Id.* The \$15 million in revenue expected in 1994 was one-third of the city's budget. *Id.*

¹⁶⁸ Salomon, *supra* note 121, at 10.

¹⁶⁹ Telephone interview with Beverly Martin, Executive Director, Casino Operator's Association (Feb. 1995).

¹⁷⁰ Walters, *supra* note 13, at 11. Mayor A.J. Holloway of Biloxi feels that the city needs to be allowed to "catch its breath." *Id.* With the progress going so rapidly, Holloway fears that Biloxi will be unable to consider thoughtfully the direction which it should take. *Id.*

¹⁷¹ Salomon, *supra* note 121, at 10.

¹⁷² Beebe, *supra* note 12, at A1.

¹⁷³ Walters, *supra* note 13, at 11. John Albert, a limousine driver for The Grand in Gulfport, pointed out that "[p]eople are even coming here from other states to get employment because of the gambling." *Id.*

¹⁷⁴ See *infra* notes 252-61 and accompanying text.

VII. NATCHEZ

The Natchez experience illustrates the need to keep a close eye on casino development. Merely allowing a casino or riverboat to open will not guarantee success. The Natchez riverboat in question is the Lady Luck. According to Natchez Mayor Larry W. "Butch" Brown, the city made "the poorest deal" in terms of revenue that would be received by the city.¹⁷⁵ Other communities "went to school on the Natchez package."¹⁷⁶ Anxious to cut a deal and get in on the casino bandwagon, Natchez agreed to collect a gaming tax far smaller than that collected in every other Mississippi gambling town.¹⁷⁷ Moreover, the city sold the dock where the Lady Luck casino is moored to a private landowner.¹⁷⁸ He, in turn, leased the dock and a parking lot to the casino for forty years at \$500,000 per year.¹⁷⁹ The landowner then returned the ownership of the dock to the city, but the city is paid only \$7000 per year as its share of the rent.¹⁸⁰ In addition, to accommodate the casino, the city took away the docking space of the Mississippi and Delta Queen, meaning that the city had to spend \$250,000 in tax-payer dollars to build a replacement dock.¹⁸¹ To a great extent, the expenses associated with this deal have nullified the profits that Natchez had hoped to reap.

All is not bad, even in Natchez. Lady Luck provides about 500 jobs, and on weekends it attracts many out-of-state gamblers to the area, so that money is brought into the community.¹⁸² In addition, work is underway to restructure the agreement with Lady Luck so that the city will reap a more lucra-

¹⁷⁵ Sullivan, *supra* note 11, at A1.

¹⁷⁶ *Id.* (quoting Natchez Mayor Larry W. "Butch" Brown).

¹⁷⁷ See *The Gamble*, *supra* note 11 (noting that gaming tax will increase in mid-1995).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *The Gamble*, *supra* note 11.

tive financial reward in the future.¹⁸³ Moreover, because the Lady Luck looks like a traditional riverboat, Natchez has been able to maintain the appearance of its riverfront. Still, it is important to recognize the necessity of carefully evaluating any sweetheart deals designed to lure casinos into an area. The gaming industry is usually lucrative enough to be profitable without special consideration.

VIII. CHOCTAW INDIAN RESERVATION

The Indian Gaming Regulatory Act of 1988 helped give tribes new power to win state approval of gambling operations.¹⁸⁴ Since then, Native-American tribes have opened about ninety casinos nation-wide.¹⁸⁵ About another eighty are in various stages of development.¹⁸⁶ The Choctaw Indians recently opened the "Silver Star," Mississippi's only land-based casino,¹⁸⁷ on a fifteen-acre piece of reservation land near Philadelphia, about eighty-five miles northeast of Jackson.¹⁸⁸ The \$37 million dollar resort offers 56 table games, 1000 slot machines, a 766-seat high stakes Indian bingo parlor, live Keno, 100 hotel rooms and three restaurants.¹⁸⁹ The Silver Star is

¹⁸³ *Id.*

¹⁸⁴ Sullivan, *supra* note 73, at A29. The passage of the Indian Gaming Regulatory Act of 1988 alone did not give tribes enough power to win approval of gambling operations in all states. *Id.* The success of Foxwoods, the world's largest casino, run by the Mashantucket Pequots also aided in giving the Indians the power they needed. *Id.*

¹⁸⁵ See *The Gamble, Part 2--Gaming on the Reservation* (CNN television broadcast, July 24, 1994) (noting that there were 88 Indian casinos as of mid-1994, with more to come).

¹⁸⁶ Brodie, *supra* note 75, at 38. Indians across the United States see gambling as salvation from poverty. *Id.* Unfortunately, according to Herb McMillan, the manager of one of Mississippi's first casinos, "[T]here's so much competition now that I'm afraid we may all be starving because there's not enough volume." *Id.*

¹⁸⁷ The tribe is not limited by the same state laws that control other gaming establishments. For a detailed discussion of the State's role in regulating Indian affairs, see Richard L. Barnes, *Indian Gaming: Congress Sends the Tribes Into a Constitutional Fray, But Did It Intend To?*, 64 MISS. L.J. 591 (1995).

¹⁸⁸ Sarah C. Campbell, *Choctaws Set for Land-Based Casino's Debut*, COM. APPEAL (Memphis), July 1, 1994, at B1.

¹⁸⁹ *Boyd Gaming Corp. to Expand California Hotel in Las Vegas; Two Openings*

the closest casino to Birmingham, Montgomery, and Tuscaloosa, Alabama.¹⁹⁰ Plans call for shuttle buses running from Birmingham and Montgomery as well as surrounding cities in Mississippi.¹⁹¹ Within one month of its opening, crowds were so far above expectations that officials were already working on expansion.¹⁹² The casino employed 1000 people when it opened, but that number has already reached 1200, and more are being hired.¹⁹³ By January 1, 1996, the hotel will be enlarged from 100 rooms to 300 rooms, more slot machines will be added, and a new bingo room may also be built.¹⁹⁴

The Choctaws, who number about 6000 on a 21,000-acre reservation spread across nine counties, will split the profits from the 40,000 square-foot casino with the Nevada-based Boyd Gaming Corporation (Boyd), which will operate the facility.¹⁹⁵ The tribe must first pay for the \$37.5 million casino, which was built with a loan from Boyd.¹⁹⁶ The tribe hopes to have the debt paid within five years.¹⁹⁷ Tribe profits will be used to pay for college scholarships for Choctaw high school graduates, to improve health care and to build houses.¹⁹⁸

Announced, PR Newswire, July 7, 1994, available in LEXIS, News Library, PRNEWS File [hereinafter *Boyd Gaming*].

¹⁹⁰ *Boyd Gaming*, *supra* note 189. Race track operators in Birmingham are already worried about the competition. Campbell, *supra* note 188, at B1.

¹⁹¹ Campbell, *supra* note 188, at B1.

¹⁹² *Booming Casino Plans Expansion*, COM. APPEAL (Memphis), July 27, 1994, at B2 [hereinafter *Expansion Plans*]. William Richardson, director of economic development for the Choctaw tribe, said, "[w]hen we opened, I would have settled for the kind of play we're getting on a Tuesday night to be our Friday night business." *Id.*

¹⁹³ *Expansion Plans*, *supra* note 192, at B2.

¹⁹⁴ *Id.*

¹⁹⁵ Campbell, *supra* note 188, at B1. Boyd Gaming Corporation owns and operates six casino entertainment properties in Las Vegas. *Id.* Boyd Gaming Corp. also owns and operates Sam's Town Hotel and Gambling Hall in Tunica, Miss., and is currently developing a project in Kansas City, Missouri. *Id.*

¹⁹⁶ *Id.* Choctaw Chief Phillip Martin explained that the casino would not be a "significant boost to the budget until we pay off our indebtedness." *Id.*

¹⁹⁷ *Id.* (citing William Richardson, director of economic development for the Choctaws).

¹⁹⁸ *Id.* at B1.

This should be a very profitable operation for the tribe but not necessarily for the state. The Choctaw casino will be able to offer high-stakes bingo, with jackpots of up to \$100,000,¹⁹⁹ which is very popular but is prohibited in other casinos.²⁰⁰ First-year revenues are projected to reach between \$80 and \$100 million.²⁰¹ In addition to gambling profits, the tribe will also collect a five percent sales tax on food and the casino's 100 hotel rooms.²⁰² Another big advantage for the Silver Star is that under the Indian Gaming Regulatory Act the tribe will not have to pay state taxes or comply with state regulations.²⁰³

Prior to the casino, the average Choctaw made about \$3000 per year.²⁰⁴ Many of them have now found better paying work with the casino. Today, about 150 of the casino's 1000 employees are Choctaws,²⁰⁵ although critics have charged Choctaws are getting mainly low-paying jobs and that the casino is harming smaller, Native-American operated businesses like grocery stores and gas stations.²⁰⁶ Opponents also fear the adverse social impact that casino gambling and promotion of alcohol may have on the tribe.²⁰⁷ Still, Native Americans across the

¹⁹⁹ *Id.* Silver Star's bingo hall will seat approximately 800 people. *Id.*

²⁰⁰ Campbell, *supra* note 188, at B1, B4; see also MISS. CODE ANN. § 75-76-5(k) (1991) (excluding bingo from definition of "game" or "gambling game" under Gaming Control Act); MISS. CODE ANN. § 75-76-3(6) (1991) (defining constitutional prohibition on lotteries). Compare *Knight v. State*, 574 So. 2d 662, 669 (Miss. 1990) (holding constitutional provision prohibiting lotteries does not apply to bingo games), with *Secretary v. St. Augustine Church*, 766 S.W.2d 499, 502 (Tenn. 1989) (holding constitutional provision prohibiting lotteries applies to bingo games).

²⁰¹ Campbell, *supra* note 188, at B1.

²⁰² *Id.*

²⁰³ See Barnes, *supra* note 187.

²⁰⁴ Gina Holland, *Choctaws Upset at No Casino Manager Jobs*, COM. APPEAL (Memphis), June 22, 1994, at B8. Some Mississippi Choctaw Indians are complaining to the Justice Department because while many still earn \$3000 annually, some non-Indian management employees earn as much as \$80,000. *Id.*

²⁰⁵ Campbell, *supra* note 188, at B1.

²⁰⁶ Holland, *supra* note 204, at B8.

²⁰⁷ Campbell, *supra* note 188, at B1; see also Holland, *supra* note 204, at B8. Gwen Willis, a Philadelphia woman who opposes the casino, said the Indian values "will deteriorate with what's being brought here." *Id.* Willis went on to say that the casinos promoted everything the reservation had fought, "especially the liquor." *Id.*

nation are hoping that gambling will help pull tribes out of the economic hole in which they have so long been mired.

IX. SATURATION CONCERNS

The Mississippi gambling market may well be reaching the point of saturation,²⁰⁸ and this could have a significant economic impact on the state. As of October, 1994, two casinos had already moved out from Mhoon Landing (in Tunica County), and another that had experienced layoffs was considering relocating to a site closer to Memphis.²⁰⁹ Work on other casino projects in that area was halted shortly after it began.²¹⁰ Some casinos in Biloxi have had to lay off employees.²¹¹ Revenue per gambling position - the casino's daily profit at each gaming table or slot machine - has been steadily declining over the past year.²¹² Nevertheless, across the state, casinos are continuing to be built. As of mid-1994, there were more than fifty applications on file with the Mississippi Gaming Commission for new projects.²¹³ It is quite likely that growth in the gambling industry will soon exceed demand.²¹⁴

When Splash Casino in Tunica was the only legal gambling spot in the area, crowds stood in line for four or five hours and

²⁰⁸ Mike Hughlett, *Ripples On the Coast; A Hugh Falls Over the Boom for Some Casinos as Money Woes Creep In*, TIMES-PICAYUNE (New Orleans), Aug. 5, 1994, at C1. Bondholders for the Biloxi Belle, for example, have seen their value drop to approximately 40 cents on the dollar. *Id.* Some analysts have called it saturation while others call it a maturing market. *Id.* Whatever the nomenclature, there is no doubt that competition has begun to silence the initial explosion on the Coast. *Id.*

²⁰⁹ Tom Charlier, *As Casinos Pull Out, Some Fret Over Landscape Scars*, COM. APPEAL (Memphis), Oct. 2, 1994, at A1. The first riverboat casino in Mississippi, The President, was forced to leave the State after suffering \$2.3 million in losses. *Id.*

²¹⁰ Charlier, *supra* note 209, at A1.

²¹¹ Walters, *supra* note 13, at 11.

²¹² Campbell, *supra* note 1, at A1. When the first casinos opened in Tunica County, revenue per gambling position averaged almost \$600 per day. Lee Ragland, *Gaming Saturation Eats Up Casino Profit Margins*, DAILY MISSISSIPPIAN, Oct. 24, 1994, at 1, 6. By late 1994, it had fallen to \$100. *Id.*

²¹³ Salomon, *supra* note 121, at 10.

²¹⁴ Campbell, *supra* note 1, at A10.

paid ten dollars per person to enter.²¹⁵ Now, with competition from other casinos, admission is free and customers must be lured with special promotions.²¹⁶ A similar situation exists on the Coast, which is already hosting twice the number of casinos experts predicted it could support.²¹⁷ Biloxi Mayor Holloway was recently working on a plan to set up contract limitations for all new city employees so that when things begin to slow down the city will not be burdened with unnecessary staff.²¹⁸

In addition to over-building in Mississippi, state gaming operators are bracing for more competition from neighboring states. Plans are underway for a giant land-based casino and fifteen new riverboat casinos in New Orleans,²¹⁹ and Mobile officials are trying to get gambling legalized in Alabama.²²⁰ Voters in Arkansas had planned to vote in November, 1994, on authorizing casinos in that state. The proposed amendments, however, were struck down by that state's supreme court.²²¹ When neighboring states do open their own gambling establishments, their residents will be far less likely to come to Mississippi to gamble. That, of course, means that there will probably be a reduction in demand, which should only exacerbate the existing saturation problem.²²²

Wall Street also seems to be concerned about saturation in the gaming industry. Listings of gambling stocks jumped in two years from twenty to more than fifty,²²³ but some prices are

²¹⁵ According to at least one report, there was a less obvious business reason for charging an admission fee. Wilkie, *supra* note 107, at 14. Splash may have been aware that adverse publicity would result if Tunica County's welfare recipients began squandering their money there, so Splash may have charged the entrance fee to discourage poor clientele. *Id.*

²¹⁶ Brodie, *supra* note 75, at 38. Splash Casino, the first casino in Tunica, offers a daily lottery for a car to attract business. *Id.*

²¹⁷ Walters, *supra* note 13, at 11.

²¹⁸ *Id.* In April, 1994, the Casino Magic Corporation, which had two casinos on the Coast, laid off 300 employees. *Id.*

²¹⁹ Salomon, *supra* note 121, at 10.

²²⁰ *Weekend Edition*, *supra* note 10.

²²¹ *Ark. Court Strikes Gambling Plan from Ballot*, CLARION-LEDGER (Jackson, Miss.), Oct. 21, 1994, at A7.

²²² *Weekend Edition*, *supra* note 10.

²²³ Brodie, *supra* note 75, at 38.

beginning to tumble.²²⁴ In 1990, only five of Atlantic City's twelve casinos reported a profit.²²⁵ The Mississippi gaming industry may have already reached the point of saturation.²²⁶ I. Nelson Rose, a professor of law at Whittier College School of Law and an analyst of state regulatory gambling systems, said that it was an error for Mississippi to allow the marketplace to decide how many casinos should be built.²²⁷ Most states statutorily limit the number of casino licenses that can be given out.²²⁸ Professor Rose predicts that there will be an inevitable casino bust cycle in Mississippi as the industry over-expands.²²⁹

The decision to let the free market fix the number of casinos in Mississippi seems reasonable on its face. States do not usually limit other industries; competition will do that. However, the profitability of the early casinos will continue to lure more casinos into the state. With the dramatic impact that these casinos have had in given areas, there will be significant displacements as old ones close and new ones open. In addition, due to the regulatory scheme, it may be necessary to ultimately limit the number of casinos in order to maintain proper supervision. If the displacement issue becomes more serious, and especially as the industry begins to face competition from other states, look for pressure on the legislature to statutorily limit the number of casinos in Mississippi, as is done in most other states.²³⁰ There may be valid reasons to establish such a rule,

²²⁴ See *Grand Casino to Buy Back 2 Million Shares*, CLARION-LEDGER (Jackson, Miss.), Oct. 27, 1994, at B8 (noting stock prices dropped almost 50% in one year).

²²⁵ See Kindt, *supra* note 130, at 56 (noting that Atlantic City's casinos now have very low profitability levels).

²²⁶ Randy McClain, *Investors Depositing Trust in Bank Stocks; Rising Interest Rates Haven't Hurt Much*, TIMES-PICAYUNE (New Orleans), June 5, 1994, at F1. Bruce Turner believes that profit margins will drop as too many casinos "slice up the market." *Id.*

²²⁷ Sayre, *supra* note 2, at B5.

²²⁸ Swanson, *supra* note 5. For instance, Illinois allows up to ten licenses, and each license is good for two casino boats. ILL. ANN. STAT. ch. 230 para. 10/7 (Smith-Hurd 1993).

²²⁹ Sayre, *supra* note 2, at B5.

²³⁰ Established casinos may be especially likely to press for such legislation. See Kindt, *supra* note 130, at 84 (discussing gambling interests lobbying for terri-

but economic theory would suggest that consumers - patrons of the casinos - are best served by the wide open competition that now exists in Mississippi. This is an issue which needs to be monitored as the Mississippi gaming industry matures.

X. COMPETITION WITH NEIGHBORING STATES

Related to the issue of saturation is the issue of competition across state boundaries. If neighboring states have gambling, and people cross state boundaries to place their bets, the state without gambling may suffer the adverse consequences that are caused by gambling, without receiving the benefit of increased revenue.²³¹ In fact, when New Hampshire introduced the first modern legal lottery in 1964, officials correctly anticipated that most of the revenue would come from ticket sales to residents of neighboring states.²³² That was clearly a benefit to New Hampshire in that it siphoned money from out-of-state purchasers to support in-state programs.²³³ By the same token, this clearly was a detriment to New Hampshire's neighboring states. In such cases, legalized gambling must be considered as a defensive mechanism. "If gaming only draws from the community, it's worthless."²³⁴

Alabama, Arkansas, Florida, Louisiana, and Tennessee are all feeling pressure from the Mississippi casinos.²³⁵ Local tourism officials have no way of tracking who comes to the

torial limits).

²³¹ See John L. Mikesell & C. Kurt Zorn, *State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence*, 46 PUB. ADMIN. REV. 311, 311 (1986) (stating that "[s]ome states implemented lotteries because of revenue they feared lost to their lottery neighbors"). Evidence that this does happen can be found in newspapers that print winning numbers from lotteries in other states.

²³² See Sullivan, *supra* note 44, at 102 (indicating that non-resident revenue was officials' intent).

²³³ DEVELOPMENTS, *supra* note 34, at 700. New Hampshire's profits dropped dramatically when its neighboring states adopted lotteries. *Id.*

²³⁴ Charles Bernsen, *Miss., Tenn. Keep Their Distance From Gambling Addict Problems*, COM. APPEAL (Memphis), Apr. 5, 1994, at A1, A11 (quoting Las Vegas Mayor Jan Jones).

²³⁵ See Lucy Morgan, *Speaker's Help Sought for Casinos*, ST. PETERSBURG TIMES, May 6, 1994, at B4 (discussing Florida's fear of losing tourists).

casinos, but license plates on cars show that they are a regional draw. In the southern part of the state, most cars are from Mississippi, followed by Louisiana and Alabama, with a few from Florida and Texas.²³⁶ In Tunica, most are from Tennessee, Mississippi, and Arkansas. At this point in time, it is reasonable to assume that the casinos are pulling out-of-state money into Mississippi. The tables, however, could turn.

Tennessee has not yet legalized casino gambling, and Louisiana has had problems getting its casinos going.²³⁷ Still, Mississippi gambling operators are concerned. Biloxi officials are worried about New Orleans, just fifty miles to the west, which plans to build the largest casino in the world.²³⁸ In Tunica, the primary concern is that Tennessee will authorize gambling, and Memphis will build its own casinos. These concerns may be especially serious, because New Orleans and Memphis have traditionally been better tourist destinations than Mississippi, and the Mississippi casinos are mobile. "As more states legalize gambling, the lure of Mississippi casinos may disappear. Then there'll be nothing to keep them . . . from drifting away."²³⁹

If neighboring states build casinos, it may still be to Mississippi's economic advantage to keep casinos here, even if the tourists stop coming. That would at least prevent Mississippi dollars from flowing out of state. The problem with this thinking, however, is that a "cycle of escalation and retaliation begins - what you might call legal gambling wars."²⁴⁰ A "parasitic dependence on revenues from residents of other states may be initially attractive, [but] it can only lead to harsh competition between [gambling] states."²⁴¹

²³⁶ Beebe, *supra* note 12, at A1. Gambling experts point out that the regional draw experienced by Mississippi is to be expected in other states that approve gambling in the future. *Id.* Las Vegas and Atlantic City are not good indicators in that they are the only two areas that draw from the entire nation. *Id.*

²³⁷ See Alan Sayre, *Louisiana Gambling Industry Mired in Controversy*, L.A. TIMES, Sept. 29, 1994, at D10 (discussing Louisiana difficulties with gambling related to land-based casino venture).

²³⁸ Walters, *supra* note 13, at 11.

²³⁹ Swick, *supra* note 153, at C7.

²⁴⁰ ROSE, *supra* note 35, at 14.

²⁴¹ King, *supra* note 38, at 752.

Legal gambling begets more of the same in states that fear they will lose money if they do not devise new ways of wagering. Illinois, for example, operates a giant lottery that is believed to siphon much money out of neighboring states. But, fearful that some cash might eventually flow back to Iowa [due to riverboat gambling], Illinois House Democrats have recommended starting roulette, blackjack and dice games on twelve paddleboats cruising six rivers that flow through or past the state.²⁴²

Accordingly, attracting money from out-of-state sources has an attractive ring, but like a pyramid scheme, such a plan will ultimately collapse. Nonetheless, with no better alternatives, legalized gambling continues to be a fairly reasonable short-term economic defense to a neighboring state that permits gambling.²⁴³

XI. IMPACTS OF GAMBLING

Unlike in years past, today's governmental entities do possess alternative ways to raise revenue, painful though they may be. Thus, before deciding to rely on gambling proceeds, policy makers should weigh the effectiveness of gambling as a revenue raising tool against any possible adverse side-effects. This is especially important in light of the universal condemnation that resulted after these comparisons were made in the nineteenth century.²⁴⁴

Most states turned to gambling with the assumption that it would be a significant source of revenue. In Mississippi, despite some regional variances, this has certainly been true. For that reason alone, it is unlikely that the state will turn its back on gambling in the near future. The questions that must be addressed, however, relate to the source of the money generated by legalized gambling and the impact that legalized gam-

²⁴² George J. Church, *You Bet Your Life: Pete Rose and the Great American Obsession*, TIME, July 10, 1989, at 16, 19.

²⁴³ Rychlak, *supra* note 16, at 58-60.

²⁴⁴ *Id.* at 32-38.

bling has on the populace.

Politicians often speak of gambling generating new money for the state. Gambling does not, however, create money out of thin air. It only transfers funds from losing gamblers to casinos, lucky winners, and the state.²⁴⁵ That money comes from losing players, who are often residents of that state.

One question never asked, and therefore never answered, is where this money is coming from. If the New York state lottery sells one billion dollars in tickets a year, and less than half of that amount is returned in the form of prizes, over half a billion dollars has been taken out of the economy. . . . Is it money that would have been spent on movies, or left in banks, or given to charity?²⁴⁶

Certainly some entrepreneurs are finding that casinos have cut into their business.²⁴⁷

There is some question as to whether Mississippians are the true beneficiaries of casino gambling. For one thing, there are no restrictions on foreign investment in Mississippi gaming operations.²⁴⁸ A proposed casino on Biloxi's Back Bay could be the first casino owned and operated by a native Mississippian,²⁴⁹ but as of mid-1994, out-of-state interests were behind all of the casinos. Additionally, according to one report, most of the good, high-paying jobs at the casinos in Tunica went to out-of-state employees.²⁵⁰ Those left to the locals were primarily minimum wage employment.²⁵¹

²⁴⁵ See CLOTFELTER & COOK, *supra* note 71, at 134 ("Some of the lottery's effects are baldly redistributive: many lose so that a few might win.").

²⁴⁶ ROSE, *supra* note 35, at 12; see also ANDREW A. ROONEY, AND MORE BY ANDY ROONEY 141 (1979) ("The man who blows twenty dollars at the [off-track betting] parlor doesn't have it to buy a new pair of sneakers for his son. What good does that do for the legitimate businessman who runs the shoe store or for the man's son?").

²⁴⁷ See *infra* notes 252-61 and accompanying text.

²⁴⁸ *Casino Law*, *supra* note 6, at 72.

²⁴⁹ *Miss. Native Plans to Build Casino*, COM. APPEAL (Memphis), Apr. 7, 1994, at A13.

²⁵⁰ *Id.*

²⁵¹ Dan Martin, *Dockside Gambling; State is Being Urged to Take a Sucker Bet*, DALLAS MORNING NEWS, May 1, 1994, at J5; see also Holland, *supra* note

Businesses that compete with casinos for disposable income can also suffer. The Biloxi Restaurant and Beverage Association lobbied for casino gambling, but the casinos are now using food and beverage as a "loss leader," causing most people to eat and drink at the casinos.²⁵² Local "mom and pop" establishments are suffering.²⁵³ In Biloxi, some local restaurants and tourist businesses have closed because they cannot compete with the casinos.²⁵⁴ The owner of one small business complained that in addition to the loss of customers, he has difficulty competing for workers because the casinos and hotel chains pay comparatively higher wages.²⁵⁵

Fishing was the main industry on the Coast in the pre-gambling days, but it too is now feeling pressure from the casinos.²⁵⁶ A number of shrimpers have already left Biloxi because casinos now occupy the docks and boat slips once used by shrimpers to get fuel and sell their catch.²⁵⁷ Although the casino operators promised to build new slips to replace the old ones, many of these projects remain unfinished.²⁵⁸ Fish processing plants and ice plants have also been forced out.²⁵⁹ The "newest growth industry on the Mississippi coast" is the pawn shop business.²⁶⁰ As one traveler to the Mississippi Coast ob-

204, at B8 (noting that opponents of gambling on Choctaw reservation claim that tribe members have not been offered better jobs).

²⁵² Beebe, *supra* note 12, at A1. Some casinos actually pay senior citizens to eat at their restaurants. See Kevin Gray, *Plentiful Perks Sweeten Pot For Seniors*, CLARION LEDGER (Jackson, Miss.), Oct. 27, 1994, at 7E. (giving senior citizens four dollars in quarters after they finish casino's \$3.75 breakfast).

²⁵³ Beebe, *supra* note 12, at A1. Ironically, the Biloxi Restaurant and Beverage Association lobbied hard for casino gambling. *Id.* However, as Nina Schwartzman, owner of one of Biloxi's better restaurants noted, "that was when gambling consisted of only two boats." *Id.*

²⁵⁴ Walters, *supra* note 13, at 11.

²⁵⁵ *New Port Should be a Blend of Both Old and New*, ST. PETERSBURG TIMES, May 16, 1994, at A9 [hereinafter *New Port*].

²⁵⁶ Walters, *supra* note 13, at 11.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* The once picturesque shrimp boats that remain on the Coast look oddly out of place lined up behind the glittering casinos. *Id.* Many shrimpers have given up on their business and gone to work for the casinos. *Id.*

²⁶⁰ Martin, *supra* note 251, at J5.

served:

This area became depressed when the oil business decreased, but the casinos have not helped the local people very much. The owner of the motel where we stayed said that he could not get anyone to work for him because the casinos and big national hotel chains paid such high wages that older, small motels were being forced out of business. A gas station owner said he has had to make everyone pay for gas ahead of time because people who lost all their money gambling would try to fill up their tanks for free in order to get home. He sells almost no groceries or soft drinks because in the casinos, they are free. He told us that whereas last year the area had one bank robbery, this year there have been seven. The casinos are ruining local businesses and simply swallowing up that entire beautiful coastline. The beach is going to disappear under casinos.²⁶¹

Similar observations have been made about Atlantic City, though the casinos were supposed to revitalize that city.²⁶²

Labor shortages and the high price of materials are slowly pushing up the cost of living space in the state.²⁶³ The real estate market for private homes has not been greatly affected by gambling in Tunica because most of the new people have chosen to rent rather than buy.²⁶⁴ Increased demand for apartments and rental houses, however, has driven rental prices to new heights. In Tunica, for instance, a trailer which once went for \$150 per month now rents for \$500 per month.²⁶⁵ Higher rental prices, of course, are driving some people out of the housing market. In the midst of Biloxi's recent prosperity, the

²⁶¹ *New Port*, *supra* note 255, at A9.

²⁶² Pete Dexter, *Just What Florida Needs - To Be Like New Jersey*, OXFORD TOWN, Oct. 6-12, 1994, at 18. In Atlantic City many promises of civil improvements made by developers were not kept. *Id.*

²⁶³ Shep Montgomery, *State's Biggest Builders Experience Dynamic Year*, MISS. BUS. J., Apr. 18, 1994, at 14. Many builders have decided not to build as many houses as they have in the past so that they can do more casino-related projects. *Id.*

²⁶⁴ Montgomery, *supra* note 263, at 14.

²⁶⁵ Martin, *supra* note 251, at J5.

number of people in homeless shelters has grown, and Biloxi's soup kitchens are turning out more meals than ever before.²⁶⁶

To a certain extent, these negative economic impacts are nothing more than natural market adjustments to the birth of a new and vigorous industry in the state. It is now harder to hire people to build homes in the state, but one can hardly complain about full employment in the construction industry. Similarly, it is hard to feel bad about casinos hiring people at good salaries and thereby driving up the cost of labor for other employers. If rental prices are artificially high in some areas today construction will eventually meet the demand and prices will come back down. If certain industries are now less profitable, that is just a reflection of the market at work. These adjustments are simple economic growing pains, inconvenient and undesirable to those who are directly impacted, but not a valid basis for challenging the gaming industry. Social issues, however, are an altogether different matter.

XII. SOCIAL PROBLEMS ASSOCIATED WITH LEGALIZED GAMBLING

In order to reach well-reasoned decisions concerning modern legalized gambling, the economic benefits derived by a state must be weighed against any adverse social consequences. Unlike the lotteries of the 1800s, today's gambling is fairly well regulated when it comes to assuring the gambler of a fair bet.²⁶⁷ Problems associated with gambling's impact on individuals, however, may be even more serious today than they were in the last century, due to modern marketing techniques.

When states benefit from gambling proceeds they have a vested interest in seeing that gambling operations are successful, and regulators sometimes take the attitude that they have

²⁶⁶ Beebe, *supra* note 12, at A1. Since the introduction of gambling to the Coast, the Salvation Army's caseload has doubled. *Id.*

²⁶⁷ See CLOTFELTER & COOK, *supra* note 71, at 48 (concluding that illegal lotteries have all but disappeared); ROSE, *supra* note 35, at 20 ("There have been less than a half-dozen major scandals involving state lotteries in the last 20 years, fewer than the number of scandals related to the regulation of atomic plants."). *But see* ALAN J. KARCHER, LOTTERIES 49 (1989) (arguing that not enough money is spent on regulation).

to help the industry. This attitude has changed the nature of gambling, the role of the state, and the relationship between the two. "There was a time when gambling had a taint, in respectable America, anyway. At best, the government tolerated it. Today, the states are the casinos, the house. They don't just tolerate gambling anymore. Now, they downright encourage it."²⁶⁸ As some observers now warn, if Mississippi relies on gambling to generate funds, the State may ultimately pay a price in broken homes, bankrupt businesses, and gambling addicts.²⁶⁹

Gambling interests want, of course, to attract new "customers" and to encourage current players to wager greater amounts (or at least to bet more often).²⁷⁰ This causes them to encourage new segments of society, including youngsters, to gamble and risk addiction to gambling.²⁷¹ Lawmakers have to be aware of this when setting policy for the state. There are at least five important non-economic impacts that the state must carefully consider when setting policy: the impact on people prone to compulsive behavior, the impact on children, the impact on poor people, the impact on crime, and the impact on the environment.²⁷² Failure to pay special attention to these matters may "generate social costs exceeding benefits."²⁷³

²⁶⁸ *48 Hours: Lottery Fever* (CBS television broadcast, Apr. 27, 1989) [hereinafter *48 Hours*].

²⁶⁹ Wilkie, *supra* note 107, at 14 (quoting Rev. Paul Jones, executive director of the Christian Action Commission, a wing of the Mississippi Baptist Convention).

²⁷⁰ See DEVELOPMENTS, *supra* note 34, at 713 (explaining that advertising agencies "create consumers—gamblers—from persons who otherwise might never bet").

²⁷¹ *Illegal use of Video Gambling Machines: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2nd Sess. 38 (1984) [hereinafter *Hearing*] (testimony of Angelo Aponte, Commissioner of Consumer Affairs, New York City).

²⁷² WEINSTEIN & DEITCH, *supra* note 36, at 5.

²⁷³ *Id.*; see also CLOTFELTER & COOK, *supra* note 71, at 217 ("To the extent that the public comes to view the pursuit of a big jackpot as an easy avenue to wealth and substitutes lottery play for education, savings, and entrepreneurial efforts, the economy as a whole may suffer.").

A. Compulsive Gambling²⁷⁴

"The documented history of compulsive gambling is as old as the most ancient civilizations."²⁷⁵ It was recently brought to the nation's attention when baseball great Pete Rose had his falling out with Major League Baseball.²⁷⁶ Compulsive gambling affects an estimated six to ten million people in the United States today,²⁷⁷ and it "almost always involves destructive behavior."²⁷⁸ The World Health Organization has recognized

²⁷⁴ The causes of compulsive gambling are difficult to identify, and problems associated with compulsive gambling are often overlooked because they are not easily specified and are not biological in nature. DOMBRINK & THOMPSON, *supra* note 49, at 12. However, a common dissociative-like state has been found to prevail among compulsive gamblers, alcoholics and compulsive overeaters. Durand F. Jacobs, *A General Theory of Addictions: Rationale for and Evidence Supporting a New Approach for Understanding and Treating Addictive Behaviors*, in COMPULSIVE GAMBLING, *supra* note 16, at 35, 54. Thirty to fifty percent of compulsive gamblers in Gamblers Anonymous report withdrawal symptoms when they stop gambling. See COMPULSIVE GAMBLING, *supra* note 16, at 7 (noting similar behavior patterns among compulsive gamblers and narcotic addicts); see also Henry R. Lesieur, *The Compulsive Gambler's Spiral of Options and Involvement*, 42 PSYCHIATRY 79, 81 (1979) (describing chase philosophy (betting more to make up for losses) as major contingent in becoming compulsive gambler).

²⁷⁵ COMPULSIVE GAMBLING, *supra* note 16, at 9.

²⁷⁶ Church, *supra* note 242, at 19.

²⁷⁷ ROBERT CUSTER & HARRY MILT, WHEN LUCK RUNS OUT: HELP FOR COMPULSIVE GAMBLERS AND THEIR FAMILIES, 22, 35-36, 39-41 (1985); see also COMPULSIVE GAMBLING, *supra* note 16, at 5 (estimating three to twelve million affected by compulsive gambling in United States). But see SKOLNICK, *supra* note 69, at 20.

Gamblers Anonymous puts the number in the United States at 6 million, but the figure is hard to believe: the concept of compulsion as employed by that organization is so broad that it includes a large number of persons with all kinds of troubles. Or perhaps Gamblers Anonymous, like other organizations, seeks to upgrade its importance by exaggerating the problem.

Id. (footnote omitted).

²⁷⁸ Ricardo Chavira, *The Rise of Teenage Gambling*, TIME, Feb. 25, 1991, at 78. Experts agree that casual gambling in which only small amounts of money are wagered is essentially harmless. *Id.* The fear is that the habit may escalate. *Id.* The emotional impact on the compulsive gambler's family is also significant. Valerie C. Lorenz & Duane E. Shuttlesworth, *The Impact of Pathological Gambling on the Spouse of the Gambler*, 11 J. OF COMM. PSYCHOL. 67, 69 (1983). In a survey of 250 members of Gamblers Anonymous, 84% of the children and spouses

compulsive gambling as a disease,²⁷⁹ and the American Psychiatric Association has identified pathological gambling as a mental disorder.²⁸⁰ Several defendants have even asserted compulsive gambling as a type of insanity defense in criminal cases.²⁸¹

If legalized gambling were doing no more than getting the compulsive gambler to bet with the casino instead of a bookie, then there would be no net contribution to the problem of com-

considered themselves emotionally ill as a result of the experience; 78% of the spouses had threatened separation or divorce; 12% had attempted suicide; and 25% of the children had significant behavioral or adjustment problems. *Id.*; see also Joanna Franklin & Donald R. Thomas, *Clinical Observations of Family Members of Compulsive Gamblers*, in COMPULSIVE GAMBLING, *supra* note 16, at 135, 140-42 (describing severe emotional problems often associated with children of compulsive gamblers).

²⁷⁹ CUSTER & MILT, *supra* note 277, at 36. But see SKOLNICK, *supra* note 69, at 15.

Unlike drugs, such as alcohol, heroin, tobacco, or cannabis, gambling cannot produce physiological effects in an individual. Even non-marital sex can, however implausibly, be considered damaging to one's health: venereal disease being an obvious case in point. In contrast, gambling does not readily lend itself to analysis as a medical model of pathology. No one could possibly allege that it is linked with a high incidence of cancer, pulmonary disorder, or brain damage. Nor is gambling physiologically addicting. If a player suffers from withdrawal symptoms, these obviously must be entirely psychological. Still, a variety of apparently intelligent commentators persist in discussing gambling in terms of social and personal pathology.

Id.

²⁸⁰ AMERICAN PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 291 (3d ed. 1980). The American Psychiatric Association (APA) defines pathological gambling as "a chronic and progressive failure to resist impulses to gamble and gambling behavior that compromises, disrupts, or damages personal, family or vocational pursuits." *Id.*

²⁸¹ See, e.g., *United States v. Torniero*, 735 F.2d 725, 734-35 (2d Cir. 1984) (rejecting defense in this case, but noting it might be available in other cases), *cert. denied*, 469 U.S. 1110 (1985); *United States v. Lewellyn*, 723 F.2d 615, 619-20 (8th Cir. 1983) (excluding evidence of compulsive gambling in trial for theft); *United States v. Gilliss*, 645 F.2d 1269, 1279 (8th Cir. 1981) (finding no error in failure to subpoena witness who would have testified as to gambling problems); *State v. Lafferty*, 456 A.2d 272, 273 (Conn. 1983) (*per curiam*) (acquitting defendant on grounds of insanity); see also Milton E. Burglass, *Compulsive Gambling: Forensic Update and Commentary*, in COMPULSIVE GAMBLING, *supra* note 16, at 205, 209-20 (discussing future of this defense).

pulsive gambling from legalized gambling. That, however, does not seem to be the history. Rather than providing compulsive gamblers with a legal alternative to the already existing forms of gambling, legalized gambling tends to encourage non-gamblers to begin gambling.²⁸² This, of course, creates new potential problem gamblers.²⁸³ Experts suggest that four of every 100 people risk becoming compulsive gamblers,²⁸⁴ and legal gambling leads to an "inevitable increase" in that number.²⁸⁵

²⁸² See Rychlak, *supra* note 16, at 56-58.

²⁸³ According to Gamblers Anonymous, if you answer yes to at least seven of these questions, you are probably a compulsive gambler:

- Do you ever lose time from work due to gambling?
- Has gambling made your home life unhappy?
- Does gambling affect your reputation?
- Do you ever feel remorse after gambling?
- Do you ever gamble to get money with which to pay debts or to solve other financial problems?
- Does gambling cause a decrease in your ambition or efficiency?
- After losing, do you feel you must return as soon as possible and win back your losses?
- After winning, do you have a strong urge to return and win more?
- Do you often gamble until your last dollar is gone?
- Do you ever borrow to finance your gambling?
- Have you ever sold anything to finance your gambling?
- Are you reluctant to use "gambling money" for normal expenditures?
- Does gambling make you careless about the welfare of yourself or your family?
- Do you ever gamble longer than you had planned?
- Do you gamble to escape worry or trouble?
- Have you ever committed or considered committing an illegal act to finance gambling?
- Does gambling cause you to have difficulty sleeping?
- Do arguments, disappointments or frustration create an urge in you to gamble?
- Do you ever have an urge to celebrate good fortune by gambling?
- Have you ever considered killing yourself as a result of your gambling?

Gambling Fever Burns up Bills, Then Lives, and 'It Happens So Fast', COM. AP-PEAL (Memphis), Apr. 4, 1994, at A1 [hereinafter *Gambling Fever*].

²⁸⁴ 48 Hours, *supra* note 268.

²⁸⁵ CUSTER & MILT, *supra* note 277, at 40 (emphasis added); see also ROSE, *supra* note 35, at 11 ("[T]here will definitely be some individuals, hundreds or

A study focusing on the Delaware lottery found that the incidence of pathological gambling increased by ninety-four percent after the daily lottery was introduced.²⁸⁶ Moreover, as legalized gambling has spread to more and more states, the problem has been compounded.

When serious gambling could only be found in Nevada, at the race tracks, or through illegal outlets, a problem gambler could relocate himself or herself away from those places where gambling was present. If, however, we are moving toward a situation in which commercial gambling is present in nearly every community in a wide variety of forms, schizophrenic problem gamblers may end up with having no place to hide.²⁸⁷

Thus, it is not surprising to find evidence of a recent increase in the number of problem gamblers throughout this country,²⁸⁸ and especially in the South. Of course, the South's gambling bonanza is the "almost-exclusive province of Mississippi."²⁸⁹

According to the New Jersey Council on Compulsive Gam-

thousands, who will fall victim to compulsive gambling, loan sharks, prostitution, and theft."); H. Roy Kaplan, *State Lotteries: Should Government Be a Player?*, in COMPULSIVE GAMBLING, *supra* note 16, at 187, 195 ("[T]here is general agreement among clinicians that the increased availability of legalized gambling is contributing to increased abuse.").

²⁸⁶ LEGIS. BUDGET AND FIN. COMM., PA. GEN. ASSEMBLY, REPORT ON A PERFORMANCE AUDIT OF THE PENNSYLVANIA STATE LOTTERY 74 (Sept. 1987) [hereinafter PA. REPORT].

²⁸⁷ William R. Eadington, *Problem Gambling and Public Policy: Alternatives in Dealing with Problem Gamblers and Commercial Gambling*, in COMPULSIVE GAMBLING, *supra* note 16, at 175, 184; *see also* ROONEY, *supra* note 246, at 141 ("If blackjack was whiskey, I could become an alcoholic. I'm glad no casino is readily available to me because I need to be protected from myself.").

²⁸⁸ *See* Durand F. Jacobs, *Illegal and Undocumented: A Review of Teenage Gambling and the Plight of Children of Problem Gamblers in America*, in COMPULSIVE GAMBLING, *supra* note 16, at 245, 263 (noting overall increase of 37% in number of problem gamblers between 1975 and 1988); Henry R. Lesieur, *Current Research into Pathological Gambling and Gaps in the Literature*, in COMPULSIVE GAMBLING, *supra* note 16, at 225 (estimating that 80% of American population gambles).

²⁸⁹ Sayre, *supra* note 2, at B5.

bling, the South is the fastest-growing trouble area in the nation.²⁹⁰ Mississippi experts in mental health predict that compulsive gambling will "become a very public problem very soon."²⁹¹ There used to be just a single, sparsely attended meeting of Gamblers Anonymous in Biloxi, but now there are five well-attended sessions each week.²⁹² Calls to Gamblers Anonymous hotlines have significantly increased from this area of the nation.²⁹³ At the publicly funded Gulf Coast Mental Health Center, caseloads are up.²⁹⁴ Gamblers Anonymous in Memphis, the nearest big city to Tunica, reports that ninety percent of its members are casino gamblers, presumably due to the Tunica County casinos.²⁹⁵

The National Council on Problem Gambling and the gambling industry report that problem gamblers make up two to six percent of the gambling population.²⁹⁶ Most of those studies, however, were done when legalized gambling was confined to Nevada and New Jersey.²⁹⁷ "I'd say it's more like fifteen percent of the population that has trouble with gambling," said Jim Jongewaard, director of recovery programs for chemical dependency and compulsive gambling at the Memphis Psychological Center.²⁹⁸ "The proliferation of casinos has created a situation like the introduction of cheap, easy-to-get crack cocaine in the 1980s that touched off a huge wave of drug addiction."²⁹⁹

²⁹⁰ *Gambling Fever*, *supra* note 283, at A1. The number of calls from Mississippi to the New Jersey hotline 1-800-GAMBLER jumped from 1 in January of 1993 to 58 last December. *Id.*

²⁹¹ Bernsen, *supra* note 234, at A11 (quoting Newton Dodson, executive director of the four-county mental health district that includes Tunica).

²⁹² Beebe, *supra* note 12, at A1.

²⁹³ Mary Judice, *Experts: La. Should Have Gambling Hotline*, TIMES-PICAYUNE (New Orleans), May 24, 1994, at D1; see *supra* note 290 and *infra* notes 309-11 and accompanying text.

²⁹⁴ Beebe, *supra* note 12, at A1.

²⁹⁵ *Gambling Fever*, *supra* note 283, at A1. Neither Tennessee nor Arkansas at this time has any casinos. *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at A4.

²⁹⁹ *Id.* at A1 (citing Jim Jongewaard, director of recovery programs for chemi-

Mississippi does not currently have a plan and has not yet appropriated any money to address the issue of compulsive gambling.³⁰⁰ State Rep. Tyrone Ellis (D-Starkville) sponsored a bill in 1994 that would have assessed an extra tax of 0.1% on gross casino revenues to generate up to \$250,000 for a gamblers' rehabilitation program, but it died in the House Ways and Means Committee.³⁰¹ Thus, as it currently stands, compulsive gamblers who want help must rely primarily on private sources such as hospital addiction programs, private therapists, and groups like Gamblers Anonymous.³⁰²

Health care professionals in this area of the country have not had significant exposure to compulsive gambling, so they do not have much experience in dealing with it.³⁰³ This makes it difficult for therapists to deal with compulsive gamblers, whose problems often are obscured by other addictions or psychologi-

cal dependency and compulsive gambling at the Memphis Psychological Center).

³⁰⁰ See Bernsen, *supra* note 234, at A1 (noting that Tennessee also has no plans or appropriations to address compulsive gambling).

³⁰¹ *Id.* at A11. Rather than an extra tax, House Ways and Means Committee Chairman Charlie Williams (D-Senatobia) favors appropriating money from a general fund to aid problem gamblers. *Id.*

³⁰² Gamblers Anonymous has been described as

a group therapy technique that uses only ex-gamblers as helpers. It involves confession of misdeeds, acknowledgement of guilt and penance, and acceptance of personal responsibility. GA provides the gambler with a sponsor whose main task is to perform an audit of a gambler's finances, take total control of the gambler's income (transferring finances to the spouse or "significant other" of the gambler has been found untenable as this only encourages the gambling to continue), and provide for graduated payments to bookmakers and other creditors.

A STUDY OF PROBLEM AND PATHOLOGICAL GAMBLING AMONG CITIZENS OF INDIANA ASSOCIATED WITH PARTICIPATION IN THE INDIANA STATE LOTTERY, 43-44 (Nov. 1990). For a description of a typical meeting, see Alvin Scodel, *Inspirational Group Therapy: A Study of Gamblers Anonymous*, 18 AM. J. OF PSYCHOTHERAPY 115, 115-17 (1964) (reporting on author's eight month investigation). There are now over 500 Gamblers Anonymous chapters in the United States and Canada. CLOTFELTER & COOK, *supra* note 71, at 124. There are also two related organizations; Gam-Anon for spouses and Gamateen for children of compulsive gamblers. ROSE, *supra* note 35, at 295.

³⁰³ Bernsen, *supra* note 234, at A1 (quoting Jim Jongewaard, director of recovery programs for chemical dependency and compulsive gambling at Memphis Psychology Center).

cal illnesses.³⁰⁴ As such, gamblers are being treated through the drug and alcohol programs, which are not geared to handle gambling problems.³⁰⁵ Moreover, many compulsive gamblers avoid seeking help because such treatment is often excluded from insurance coverage.³⁰⁶

Some states require a certain percentage of gambling proceeds to support programs to help compulsive gamblers. A three percent tax in Iowa generates \$1.2 million a year for the State's gamblers assistance funds.³⁰⁷ New Jersey earmarks the first \$500,000 in fines levied on casinos for the compulsive gambling council.³⁰⁸ The New Jersey Council on Compulsive Gambling operates a toll-free national hotline for problem gamblers: 1-800-GAMBLER.³⁰⁹ Sixteen percent of the calls received at that number are now from Mississippi or Louisiana.³¹⁰ In 1993, Mississippi gamblers made 582 calls to the number; by April of 1994 they had already made 508.³¹¹

The problems associated with compulsive gambling are not limited to the personal downfall of the gambler. "Economic losses from work absenteeism, bad debts, and crime [due to gambling problems] have been estimated at over \$34 billion annually to our society."³¹² According to some reports, every problem gambler negatively impacts between seven and seventeen other people³¹³ and costs society approximately \$52,000

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ IOWA CODE ANN. § 99F.11 (West Supp. 1994).

³⁰⁸ Bernsen, *supra* note 234, at A1.

³⁰⁹ Judice, *supra* note 293, at D1. Louisiana Law requires the 1-800-GAMBLER number to be posted on all decks of the gambling boats, but there is no similar requirement in Mississippi. *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Kaplan, *supra* note 285, at 195 (citing Politzer et al., Report on the Social Cost of Pathological Gambling and the Cost-Benefit Effectiveness of Treatment, FIFTH NATIONAL CONFERENCE ON GAMBLING AND RISK TAKING PROC. (1982)); see also Kindt, *supra* note 130, at 62 (noting problems associated with problem gamblers cancelling their insurance to have more money for gambling).

³¹³ Kindt, *supra* note 130, at 61.

per year.³¹⁴

Until about 1980, the typical member of Gamblers Anonymous was a middle-aged, middle class, white man - usually a businessperson or a professional.³¹⁵ Gambling addicts now include teenagers, retired people, women, and people from all races and income levels.³¹⁶ This spread of gambling problems to new segments of society seems to be linked to the spread of state sponsored gambling. "[O]nce gambling is legalized - once gambling becomes sociologically acceptable - the number of compulsive gamblers increases from .77% to between 1.5% to 5% of the population."³¹⁷

Video gambling, in particular, seems to have attracted new segments of society to compulsive gambling.³¹⁸ According to one player, video poker machines are

mesmerizing. Hypnotic. While you're staring at the screen, you don't think about the dishes in the sink or that your car hasn't had a full tank of gas in years or that your babysitter is having problems or your husband is mad again because you're not there. It's a total escape.³¹⁹

Many of the Mississippi casinos devote about half of their floor space to video slot machines, and they are played primarily by

³¹⁴ Martin, *supra* note 251, at J5.

³¹⁵ *Hearing*, *supra* note 271, at 97 (prepared statement of Valerie C. Lorenz, Ph.D). This description is generally in accord with the patterns found by the Commission on the Review of the National Policy Toward Gambling; however, the Commission also found that these generalizations change sharply when considering only illegal betting. GAMBLING IN AMERICA, *supra* note 53, at 58; *see also* Lee Ragland, *Educated More Likely to Gamble*, CLARION-LEDGER (Jackson, Miss.), Oct. 24, 1994, at A1 (noting that in Mississippi, casino patronage tends to increase with education level).

³¹⁶ *See* Kindt, *supra* note 130, at 66 (discussing preteen gambling addiction and identifying it as "national disgrace" in United Kingdom).

³¹⁷ *Id.* at 64 (footnotes omitted).

³¹⁸ Because such games are attractive to children, some experts are concerned that the video gambling will encourage youngsters to gamble. *Hearing*, *supra* note 271, at 107-08 (prepared statement of the National Coin Machine Institute); *id.* at 96-97 (prepared statement of Valerie C. Lorenz, Ph.D). Such concerns prompted law makers in at least one state to oppose video lotteries. *See, e.g.*, N.J. Stat. Ann. § 5:9-7.1 (1988) (prohibiting video lottery).

³¹⁹ *Gambling Fever*, *supra* note 283, at A1.

women.³²⁰ While currently most of the members of Gamblers Anonymous are men, the organization expects to see many more women members in the near future, due primarily to video slot machines.³²¹

In addition to attracting new segments of society to gambling, video gambling devices have accelerated the speed at which gambling becomes a serious problem. Previous studies showed a typical pattern of ten to fifteen years of compulsive gambling before a person "hits bottom."³²² With video slot machine addicts, this period is dramatically reduced to as little as a few months.³²³ As such, the effects of widespread compulsive gambling problems may begin to show up within the state in the very near future, and the state should begin to brace for that eventuality.

B. Children and Gambling

Ten years ago teenage gambling did not appear to be a problem.³²⁴ Today counselors report that seven percent of their caseload involves teenage gamblers.³²⁵ One recent study indicates that teenagers may be three times more likely than adults to become problem gamblers.³²⁶ The Executive Director of the National Council on Problem Gambling explained, "[w]e have always seen compulsive gambling as a problem of older people Now we are finding that adolescent compulsive

³²⁰ Brodie, *supra* note 75, at 38; see also Beebe, *supra* note 12, at A1 (explaining that slots at Mississippi casinos are played mainly by women).

³²¹ *Gambling Fever*, *supra* note 283, at A1.

³²² *Hearing*, *supra* note 271, at 11.

³²³ See *id.*

³²⁴ Chavira, *supra* note 278, at 78. California psychologist Durand Jacobs believes that students are more than twice as likely to become compulsive gamblers than are adults. *Id.* A different survey, performed at St. John's University in New York, found eight times as many problem gamblers among college students as among adults in general. *Id.*

³²⁵ *Id.*; see also Kindt, *supra* note 130, at 65 ("[I]n 1992, the range of adolescents who were already problem or compulsive gamblers was between 4% and 15%.").

³²⁶ Jacobs, *supra* note 288, at 281.

gambling is far more pervasive than we had thought."³²⁷ Because adolescent gambling was not seen as a widespread problem until this past decade, there has not been much research into teenage gambling.³²⁸ Unfortunately, experts fear that current psychological profiles and analytical data may not work with teenage gamblers.³²⁹ This incongruity creates additional problems for young gamblers because treatment centers for youthful gamblers are "virtually nonexistent."³³⁰ As one psychologist has explained, "[P]ublic understanding of gambling is where our understanding of alcoholism was some forty or fifty years ago Unless we wake up soon to gambling's darker side, we're going to have a whole new generation lost to this addiction."³³¹ One reason for the recent surge in teenage gambling may be the active promotion of legal gambling. "[T]here is no question that children are exposed to much celebration of the lottery on television. . . ."³³² Laws have a teaching function, similar to museums, libraries, public television, and education.³³³

If members of the next generation are persuaded that the way to get ahead is through education, hard work, and deferred gratification, then our old age pensions are secure. But if they come to believe that success is a matter of luck, or that there is no point in working hard when an effortless play of the

³²⁷ Chavira, *supra* note 278, at 78 (quoting Jean Falzon).

³²⁸ See Jacobs, *supra* note 288, at 263-64 ("Potentially harmful effects of teenage gambling simply had not been a matter for professional, scientific, governmental, or lay scrutiny, as attested to by the virtually silent literature on this topic before 1980.").

³²⁹ *Id.* at 257.

³³⁰ Chavira, *supra* note 278, at 78 (quoting California psychologist Durand Jacobs).

³³¹ *Id.*

³³² CLOTFELTER & COOK, *supra* note 71, at 133. Former Arizona Governor Bruce Babbitt said that banning sales of lottery tickets to minors was unenforceable. *Id.* at 134. He described the tickets as "part of the culture" at the public school to which he sent his children. *Id.*

³³³ JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS 50-52 (1980); see also Lakshman Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind?*, 1989 WIS. L. REV. 463, 509 (1989) (stating that "[e]conomic analysis seeks to subvert this teaching function of the law").

lottery can have the same effect, then the whole society suffers.³³⁴

Most parents seem to recognize that casinos are inappropriate places for children. A survey conducted by the Harrison County Tourism Office before the casinos came showed that seventy-seven percent of those polled considered the Gulf Coast a family place.³³⁵ Since the casinos came, the same poll shows only four percent consider it a place for families.³³⁶

Although teenagers are officially barred from casinos,³³⁷ they often manage to get in.³³⁸ Some of the newer Mississippi casinos even have playrooms and video arcades for children.³³⁹ If parents begin bringing their children to the casinos on a regular basis, it can become a family tradition just like going to a baseball game or going on a picnic. If that happens, it will be hard to encourage teenagers to avoid the temptations contained in the casinos when they get older.

Even where children themselves are not gambling, they often suffer when family members gamble. For one thing, children of compulsive gamblers are prone to become problem gamblers.³⁴⁰ Moreover, compulsive gamblers are usually not good parents.

The children of compulsive gamblers are caught in a process that reflects extremes in behavior by their parents. At

³³⁴ CLOTFELTER & COOK, *supra* note 71, at 133; *see also id.* at 244 (suggesting that long term economic interest of state may be damaged by undermining public values); 48 *Hours*, *supra* note 268 (complaining that lottery promotions conflict with basic message of education).

³³⁵ Beebe, *supra* note 12, at A1.

³³⁶ *Id.*

³³⁷ In Mississippi a person must be 21 years of age or older to play or be allowed to play any licensed game or slot machine, or to loiter in any licensed premises. MISS. CODE ANN. § 75-76-155(1)(a) (1991). Despite similar rules in New Jersey, approximately 29,000 underage gamblers are ejected from Atlantic City casinos each month. Chavira, *supra* note 278, at 78; *see also* Jacobs, *supra* note 288, at 253 (noting that casinos are attractive to high school students).

³³⁸ *See* Kindt, *supra* note 130, at 75 (noting that 64% of Atlantic City high school students had gambled in a casino and 9% did so weekly).

³³⁹ Swick, *supra* note 153, at C7.

³⁴⁰ Jacobs, *supra* note 288, at 252, 259.

times the gambler dotes on them; at other times he ignores them. . . . The children respond by feeling angry, hurt, lonely, guilty, abandoned, and rejected. They experience troubled teen years and run away from home, use drugs, become depressed, and experience psychosomatic illnesses.³⁴¹

Studies have also found numerous cases of parents who are delinquent with child support payments, but who spend a great deal of money gambling.³⁴² In Mississippi, judges are already reporting an increase in divorces and in fathers' failure to pay child support.³⁴³ In some states, legalized gambling has been linked to an increase in child abuse and domestic violence cases.³⁴⁴ These problems have all been exacerbated, if not caused, by the state's recent shift in gaming laws. If the reason for the legalization of gambling is a simple cost-benefit question, we must recognize the true costs of legalization. When one begins to weigh in these costs, the decision to legalize gambling becomes far less clear.

C. The Impact on Criminal Activity

Since legalized gambling leads to increased illegal gambling,³⁴⁵ crime will inevitably increase when gambling is legalized. If the only crime that increased was illegal gambling, then the result might be negligible. Legalized gambling's impact on criminal behavior is not, however, limited to an in-

³⁴¹ Lesieur, *supra* note 288, at 236; *see also* Lorenz & Shuttlesworth, *supra* note 278, at 69 (explaining that 84% of children and spouses considered themselves emotionally ill; 12% had attempted suicide; and 25% of children had significant behavioral or adjustment problems); Franklin & Thomas, *supra* note 278, at 140-42 (discussing severe emotional problems associated with some children of compulsive gamblers).

³⁴² Kaplan, *supra* note 285, at 194. Florida's Department of Health and Rehabilitative Services found 47 lottery winners who were derelict in their child support payments. *Id.* The total amount not paid totalled more than \$100,000. *Id.*

³⁴³ Brodie, *supra* note 75, at 38. It has also been estimated that 25% of the patrons at casinos are retirees gambling with pension money. *Id.*

³⁴⁴ *See* Kindt, *supra* note 130, at 72 (noting 42% to 43% increase in child abuse cases and 80% increase in domestic violence after Deadwood, South Dakota, legalized casinos).

³⁴⁵ *See infra* notes 369-90 and accompanying text.

crease in illegal gambling. Perhaps the most serious concern is that legal gambling creates problem gamblers, and problem gamblers often turn to more serious criminal activity to support their habits.³⁴⁶

"[I]t is a matter of observation over the years that gambling does lead particularly to the crime of petty embezzlement on the part of first offenders."³⁴⁷ Approximately ninety-seven percent of incarcerated pathological gamblers and two-thirds of the unincarcerated pathological gamblers have admitted to engaging in illegal behavior to finance gambling or pay gambling related debts, and an estimated thirty percent of all current prison inmates are problem gamblers.³⁴⁸ The gambler's criminal behavior is driven both by a need to replace lost money,³⁴⁹ and by a fundamental shift in values that often accompanies a compulsive behavior pattern.³⁵⁰ "[C]ompulsive gamblers are engaged in a spiral of options and involvement wherein legal avenues for funding are used until they are closed off."³⁵¹ The end result is criminal activity.

On the Mississippi Coast, preliminary figures indicate that some property crime is down (perhaps because more people are employed and have money) but that violent crime is much higher.³⁵² Although crime is down nationally,³⁵³ crime has

³⁴⁶ See Lesieur, *supra* note 274, at 83 (noting that "borrowing crimes" such as loan fraud, check forgery, and embezzlement typically rise when gambling is legalized); Chavira, *supra* note 278, at 78 (describing problem gamblers who turn to criminal activity); see also 48 Hours, *supra* note 268 (showing problem gamblers who stole money to play lottery).

³⁴⁷ PERKINS, *supra* note 18, at 68; see also Lesieur, *supra* note 288, at 239 ("Ultimately, pathological gambling results in crime."); Shaffer, *supra* note 16, at 7 (noting "the resemblance between the crime patterns of compulsive gamblers and narcotics addicts").

³⁴⁸ Lesieur, *supra* note 274, at 239.

³⁴⁹ See Lorenz & Shuttlesworth, *supra* note 278, at 69 (explaining that 99% of family members of compulsive gamblers report financial problems related to gambling).

³⁵⁰ See Lesieur, *supra* note 274, at 84-86; see also PERKINS, *supra* note 18, at 69 (noting that "gambling depreciates the personal character").

³⁵¹ Lesieur, *supra* note 274, at 240.

³⁵² Beebe, *supra* note 12, at A1. A gaming intelligence officer with the Harrison County Sheriff's Department said that "bank robberies just went through the roof." *Id.* Also, many of the muggings on the Coast took place in casino park-

increased about twenty percent since the casinos came to the Gulf Coast.³⁵⁴ Burglary and larceny are the most often committed crimes.³⁵⁵ In response, Biloxi has bought twelve new police cars and hired more police officers.³⁵⁶ The Mississippi Coast Crime Commission has agreed to work with the University of Southern Mississippi to study why crime is increasing.³⁵⁷

In addition to "street crime," gambling has traditionally been associated with organized crime. Even today, gambling is an important revenue source for organized crime.³⁵⁸ Current estimates of illegal gambling run as high as one billion dollars annually wagered in New York City alone,³⁵⁹ and one hundred billion wagered nationally.³⁶⁰ Much of that is controlled by organized crime. In 1977, the National Institute of Law Enforcement and Criminal Justice estimated that organized crime controlled half of all the illegal gambling in the

ing lots. *Id.*

³⁵³ Carolyn Skorneck, *Overall Crime Rate is Lowest Since '86, FBI Says—Homicides Rise; Memphis is 23rd*, COM. APPEAL (Memphis), Dec. 4, 1994, at A1. In 1994, the overall crime rate was 5,482.9 serious crimes per 100,000 population. *Id.* Violent crime was at 746.1 while property crime was at 4,736.9. *Id.*

³⁵⁴ Beebe, *supra* note 12, at A1 (citing Mississippi Coast Crime Commission).

³⁵⁵ *Coast Crime Shows Jump of 20 Percent*, COM. APPEAL (Memphis), July 11, 1994, at B2.

³⁵⁶ Walters, *supra* note 13, at 11.

³⁵⁷ *Gulf Coast Crime Rate is Tracked*, TIMES-PICAYUNE (New Orleans), July 11, 1994, at B4.

³⁵⁸ It is widely believed (and was depicted in the motion pictures *The Godfather II* and *Bugsy*) that organized crime moved into Nevada when that state opened itself up to legalized gambling. See Nevada Tax Comm. v. Hicks, 310 P.2d 852, 854 (Nev. 1957) (expressing concern over possible infiltration of Nevada's legalized gambling by organized crime); see also SKOLNICK, *supra* note 69, at 35-36 ("[I]n the 1950's and 1960's, . . . former bootleggers openly ran [Las Vegas] hotel-casinos."). See generally Jerome H. Skolnick & John Dombrink, *The Limits of Gaming Control*, 12 CONN. L. REV. 762 (1980) (discussing organized crime's role in legalized gambling).

³⁵⁹ DOMBRINK & THOMPSON, *supra* note 49, at 99.

³⁶⁰ ROSE, *supra* note 35, at xiii; see DEVELOPMENTS, *supra* note 34, at 740 ("Estimates of the amount wagered annually through organized illegal operations vary greatly, but virtually all are in the billions of dollars."). Of course, the exact amount of any illegal activity is very difficult to determine. Rychlak, *supra* note 15, at 572.

Northeastern section of the United States.³⁶¹ In some states, it was hoped that legalized gambling would displace illegal gambling, thereby taking away one of organized crime's primary sources of revenue.³⁶² If legalized gambling were able to draw its customers from patrons of the illegal games, the state could raise revenue and fight crime at the same time.

Although politicians deem the lottery a "voluntary tax," they realize that it is a burden that *someone* will have to shoulder. In general, they believe that the burden should fall primarily on organized criminals. Indeed, mobsters are presumably earning billions of dollars each year from illegal gambling. If the public could be wooed from the illegal to the state-run games, lottery profits would come at the expense of organized criminals. By diverting the funds from the syndicates to the states, the lottery would kill two birds with one stone. It would fight crime while it raised money.³⁶³

Accordingly, some states identified the elimination of organized crime's control of illegal gambling as one of the goals of state sanctioned gambling.³⁶⁴ Unfortunately, that has not been the case in most places.

In general, legalized gambling has not been successful in combatting illegal gambling,³⁶⁵ but it is too early to tell what

³⁶¹ DEVELOPMENTS, *supra* note 34, at 123, 741. More recent studies indicate that illegal gambling is not controlled by one huge syndicate, but rather by several smaller organizations. CLOTFELTER & COOK, *supra* note 71, at 131.

³⁶² The term "organized crime" has many meanings. DEVELOPMENTS, *supra* note 34, at 110 n.77. The Commission on the Review of the National Policy Toward Gambling equated it with the Mafia or *La Cosa Nostra*. GAMBLING IN AMERICA, *supra* note 53, at 171. In this paper, "organized crime" refers to large scale operations which use force, bribery, and intimidation to conduct their unlawful activities, regardless of any ethnic, racial, or other distinguishing features.

³⁶³ DEVELOPMENTS, *supra* note 34, at 682 (footnote omitted).

³⁶⁴ See, e.g., PA. STAT. ANN. tit. 72, § 3761-2 (1995) (listing aid to elderly and curbing illegal gambling as lottery's purposes); see also Lester B. Snyder, *Regulation of Legalized Gambling: An Inside View*, 12 CONN. L. REV. 665, 666 (1980) (identifying stopping illegal gambling as secondary purpose of state run lotteries).

³⁶⁵ See DEVELOPMENTS, *supra* note 34, at 707 ("Patrons of illegal games apparently cannot be enticed in great numbers to play the government's game, so the government must create a gambler who will."); see also 48 Hours, *supra* note 268 (suggesting that lottery may have damaged illegal games, but they are "still func-

the impact of Mississippi's casinos will be. One serious concern is that legal gambling may attract underworld figures into the state, perhaps leading to more illegal gambling. There is evidence that organized crime figures have moved into casinos in other states.³⁶⁶ Organized crime figures have been seen on the Mississippi Coast since the casinos arrived.³⁶⁷ According to federal affidavits filed with the United States District Court in Minneapolis, one company that sought to purchase Splash Casino in Tunica and build other casinos elsewhere had links to the New York Genovese crime family.³⁶⁸

Legalized gambling may also have the unintended effect of encouraging more illegal gambling. First of all, state sanction of legal gambling tends to remove any taint from the illegal games.³⁶⁹ As such, people who would not have gambled illegally might be encouraged to do so.³⁷⁰ Legal gambling can also make it easier for illegal gambling operators to run their operations.³⁷¹ In addition, the incredible amount of money involved in the gaming industry can lead to police corruption.³⁷²

tioning and functioning well").

³⁶⁶ See Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 140-41 (1983) (referring to intercepted conversations which concern hidden and unlawful financial interests in various Las Vegas casinos).

³⁶⁷ Beebe, *supra* note 12, at A1.

³⁶⁸ *Mafia Probe Targets Gambling Firm that Pursued Miss. Casinos*, COM. APPEAL (Memphis), July 30, 1994, at A1, A12. In May of 1994, several alleged members of the Genovese crime family were indicted for allegedly skimming from video gambling businesses in Louisiana. *Id.*

³⁶⁹ ROSE, *supra* note 35, at 10; see also Judith H. Hybels, *The Impact of Legalization on Illegal Gambling Participation*, 35 J. SOC. ISSUES 27, 35 (1979) (concluding that legal and illegal gambling are complementary and that gamblers do not substitute one for other).

³⁷⁰ Hybels, *supra* note 369, at 32. It has been noted that states with a lottery have more illegal gambling problems with residents playing the numbers. *Id.* This may be because the two types of gambling are so similar in form. *Id.*

³⁷¹ DEVELOPMENTS, *supra* note 34, at 732, 776. For instance, if sports betting is legalized, a bookie can "lay-off" bets on a given game, assuring his profitability. Rychlak, *supra* note 16, at 58. Similarly, a lottery can make it easier to run an illegal numbers game. *Id.* (explaining that illegal games use same numbers as state games).

³⁷² During his confirmation proceedings, Justice Souter was asked if he had ever been a crusader for a cause. Earle Eldridge, *Sen. Reid Wants Souter to Ad-*

Thus far, problems such as cheating, skimming, and organized crime infiltration are not evident in Mississippi, perhaps because much of the gaming investment comes from large public companies which recognize that bending the rules could jeopardize their profits. However, the industry history shows that tight regulation is usually needed. According to the head of the FBI's organized crime section, "States with strong regulations and enforcement are not experiencing an influx of organized crime. However, we expect that states with poor regulations and controls may do so."³⁷³ Questions have been raised about Mississippi's regulatory scheme.

Mississippi has assigned license and regulation authority to the Mississippi Gaming Commission.³⁷⁴ The Commission consists of three members, each serving a four year term.³⁷⁵ Mississippi regulators investigate all gaming operators before issuing a permit.³⁷⁶ The investigation focuses on the character of the operator,³⁷⁷ sources of financing,³⁷⁸ and business

dress Casino Issue, GANNETT NEWS SERVICE, Sept. 28, 1990, available in LEXIS, News Library, GNS file. He had opposed efforts to bring casino gambling to New Hampshire in 1977 while he was attorney general for the state. *Id.* "I guess my greatest crusade was the cause against bringing casino gambling into the state of New Hampshire," he stated. *Id.* "I did not believe that we had a very good chance of maintaining the integrity of the law enforcement structure of the state when the economy would have been totally overbalanced by the amount of money that would have come in for that purpose." *Id.*; see also SKOLNICK, *supra* note 69, at 260 ("The problem of bribery is particularly acute in the gaming industry.").

³⁷³ Brodie, *supra* note 75, at 38 (quoting Jim Moody, head of the FBI's organized crime section).

³⁷⁴ MISS. CODE ANN. § 75-76-7 (1991). The Commission must meet at least once per month. MISS. CODE ANN. § 75-76-13(2) (1991). The Commission is responsible for licensing. MISS. CODE ANN. § 75-76-61 (1991). The Commission is also responsible for administering discipline to licensees. MISS. CODE ANN. § 75-76-103 (1991). The members also adopt appropriate regulations. MISS. CODE ANN. § 75-76-53(1)(a) (1991). The "Executive Director" directs and supervises all administrative and technical activities of the Commission. MISS. CODE ANN. § 75-76-23 (1991). The director is also in charge of directing various investigations. MISS. CODE ANN. § 75-76-103 (1991). The Attorney General advises the Commission, and represents it in lawsuits. MISS. CODE ANN. § 75-76-25 (1991).

³⁷⁵ MISS. CODE ANN. § 75-76-9 (1991). The boards or commissions of most states consist of five to seven members. Swanson, *supra* note 5.

³⁷⁶ See MISS. CODE ANN. §§ 75-76-61 to -101 (1991) (setting out standards and procedures to obtain gaming license).

³⁷⁷ *Id.* § 75-76-67(2)(a). The applicant must be "[a] person of good character,

competency.³⁷⁹ No regulation addresses advertising and public relations activities.³⁸⁰ Licensees set their own limits on wagers and payouts for all games.³⁸¹ The Commission has the authority to revoke, suspend, limit, or condition any gaming license, and to fine any gaming licensee for any reasonable cause, including any violation of any provision of the Gaming Control Act or the Regulations of the Commission.³⁸²

There are, however, questions about the ability of the state to enforce its regulations. For example, New Jersey has 140 gaming agents patrolling twelve casinos, but as of July, 1994, Mississippi had only nine investigators covering 21 casinos.³⁸³ Still, Mississippi regulators have been averaging four patron arrests and one or two casino employee arrests for cheating each week.³⁸⁴

honesty, and integrity." *Id.*

³⁷⁸ *Id.* § 75-76-67(4)(a). The applicant must show both that the proposed financing is sufficient and "[f]rom a suitable source." *Id.* § 75-76-67(4)(b)(i),(ii).

³⁷⁹ *Id.* § 75-76-67(4)(b). The Commission is prohibited from granting a gaming license unless the applicant demonstrates that he has sufficient business experience generally or in the gaming industry. *Id.* § 75-76-67(4)(a).

³⁸⁰ CASINO LAW, *supra* note 6, at 80; *see also* Rychlak, *supra* note 16, at 60-63 (arguing that advertising has had negative effect in many states).

³⁸¹ CASINO LAW, *supra* note 6, at 68; *see also* Rychlak, *supra* note 16, at 56-57 (noting various payout rates that for some games, like lotteries, are set by state).

³⁸² MISS. CODE ANN. § 75-76-103 to -127 (1993). The Gaming Commission recently established a 24-hour phone line [1-800-504-PLAY] to hear complaints about casinos. Lee Ragland, *Ante Up: With 800 Number, Board Hears Gripes Round-the-Clock*, CLARION LEDGER (Jackson, Miss.), Oct. 27, 1994, at E7. J. Ledbetter, head of the Commission's enforcement division, said that they receive approximately three calls per day, usually asking minor questions such as the basic rules of a game. *Id.*

³⁸³ *The Gamble*, *supra* note 11. Gaming consultant Ray Koon said that "[w]ithout adequate enforcement in regulatory functions, the industry becomes much like a ship without a captain." *Id.* Mississippi seems to be improving in this area. *See Mississippi Gaming Commission Opens Enforcement Office*, DAILY MISSISSIPPIAN, Nov. 30, 1994, at 6 (discussing new Gaming Commission office in Vicksburg); *see also* Sarah C. Campbell & Bartholomew Sullivan, *Miss. Gets Tougher on Cheaters at Casinos*, COM. APPEAL (Memphis), Dec. 4, 1994, at A1 (describing various ways in which cheaters operate).

³⁸⁴ Gina Holland, *Palace Casino Manager Charged With Rigging Blackjack*, DAILY MISSISSIPPIAN, Dec. 1, 1994, at 7. Although cheating is not unusual, it is most often committed by low level employees and patrons. *Id.* The Palace Casino manager was the highest ranking official arrested in Mississippi thus far. *Id.*

There are also some questions about the ethical restrictions governing the regulators. The first two directors of the state's regulatory board quit and immediately went to work for the industry that they had been hired to regulate.³⁸⁵ It is not surprising that lawyers who have worked for enforcement agencies are in demand in the gaming industry. For one thing, such lawyers can bring a sense of integrity to an industry often associated with organized crime.³⁸⁶ More troublesome, however, is the rationale set forth by the President of the International Association of Gaming Attorneys. "We're not interested in becoming a power bloc, but we want to keep up with the latest developments and *improve relations between the casino operators and the regulators*."³⁸⁷ Close relations, of course, can lead to at least the appearance of impropriety. Other states have restrictions on the ability of regulators going to work for the industry. New Jersey regulators are not allowed to work for New Jersey casinos for two years, and Nevada has a one-year waiting period.³⁸⁸

Mississippi has tried to tighten its ethics law, but the Director of the Mississippi Gaming Board has quoted the Board's attorneys saying that "probably, if challenged, our ethics law would not be enforceable."³⁸⁹ While the evidence is inconclusive, if Mississippi follows the national trend, legalized gambling will probably not displace illegal gambling, and crime will likely increase due to the casinos.³⁹⁰ Hopefully regulations

³⁸⁵ *The Gamble*, *supra* note 11. Regulatory problems that Mississippi must confront include "too few gaming agents, conflicts of interest, and a weak ethics law." *Id.* An attorney for the Mississippi Gaming Board has noted that although the ethics law has been strengthened it would likely not hold up if challenged. *Id.* Many states require that commission members post a bond of between \$10,000 and \$25,000. See Swanson, *supra* note 5 (naming Illinois, Indiana, Iowa, and Texas as states requiring bond).

³⁸⁶ Sullivan, *supra* note 73, at A29.

³⁸⁷ *Id.* (quoting David M. Satz, Jr., former United States Attorney for New Jersey, who was recently sworn in as President of International Association of Gaming Attorneys) (emphasis added).

³⁸⁸ *Id.*

³⁸⁹ *The Gamble*, *supra* note 11 (quoting Paul Harvey, Director of Mississippi Gaming Board).

³⁹⁰ See WEINSTEIN & DEITCH, *supra* note 36, at 139 ("The daily lottery proba-

can be used to minimize the risk of infiltration by organized crime, but it will be necessary to look at the number of enforcement agents and the ethical guidelines that are applied to the regulators.³⁹¹

D. Problems of Poverty

Because gambling holds out the promise of quick riches, it is particularly appealing to those in dire economic straits. As such, it is not surprising to find that poor people tend to spend a disproportionate amount of their income on legalized gambling.³⁹² A state that is truly interested in breaking the cycle of poverty would normally be expected to promote the traditional virtues of education, hard work, thrift, and savings. State sanctioning of gambling, however, sends the opposite message. The promise of great riches may provide a fantasy for those who can afford it, but gambling is a poor choice for those who do not have disposable income.

Although casinos have helped the employment situation in many areas of the State, at least some impoverished Mississippians have seen their situation worsen. The Salvation Army's caseload in Biloxi has doubled since casinos moved into the area.³⁹³ In the midst of Biloxi's recent prosperity, the number of persons frequenting shelters for the homeless has grown, and its soup kitchens are turning out more meals than ever before.³⁹⁴ This problem is exacerbated because casinos have been reluctant to donate to charities like the Salvation Army, perhaps because that might be seen as an admission that they

bly does not substitute closely enough for the illegal numbers game to attract a significant percentage of illegal bettors.").

³⁹¹ As this article went to print, new gaming regulations were taking effect. See *New Regulations for Gaming Establishments to Take Effect*, State Watch Digest, Mar. 24, 1995, at 1.

³⁹² See PA. REPORT, *supra* note 286, at 74 ("[T]he Lottery may . . . have a negative impact on some individuals who may invest a greater portion of their incomes than they can reasonably afford with unrealized expectation of quick wealth."); Rychlak, *supra* note 16, at 51 (discussing regressivity).

³⁹³ Beebe, *supra* note 12, at A1.

³⁹⁴ *Id.*

are contributing to the problems.³⁹⁵

For those who have not found employment in the casinos or elsewhere, rising prices driven by the increased demand for goods and services only worsens their plight.³⁹⁶ This can be an especially cruel trap for senior citizens on a fixed income. At least a quarter of casino patrons are estimated to be retired people.³⁹⁷ If they gamble away their income, they are left with no option but to sell their possessions to buy life's necessities. Pawn shops have already been labeled "the newest growth industry on the Mississippi coast."³⁹⁸ In addition, auctions are regularly held to dispose of the automobiles that must be sold to pay gambling debts.³⁹⁹

It may be that increased tax revenues will help the State provide services to those who gamble away their life savings. This could help mitigate the problems caused by casino gambling, but it is an unsatisfactory long-term answer. The personal downfall of otherwise successful people who fall prey to the temptation of excess gambling is a serious concern that must be weighed in the equation when policy makers consider the impact of legalized gaming.

E. Environmental Concerns

Environmental experts say that an average casino has about the same environmental impact as a small town.⁴⁰⁰ For example, according to an Army Corps of Engineers public notice, the Sheraton Tunica Casino would destroy 2.5 acres of wetlands with its project. In addition to the 91,900 square-foot casino on barges, the "onshore" part of the complex will have a forty-five-acre parking lot for 4000 vehicles, a four lane divided

³⁹⁵ *Id.*

³⁹⁶ Snyder, *supra* note 137, at A8.

³⁹⁷ Brodie, *supra* note 75, at 38; *see also* Gray, *supra* note 252, at E7 (describing casinos that seek to attract senior citizens with food promotions).

³⁹⁸ Martin, *supra* note 251, at J5; *see also* *The Gamble*, *supra* note 11 (noting that pawn shops are opening in great numbers).

³⁹⁹ Swick, *supra* note 153, at C7.

⁴⁰⁰ Shep Montgomery, *Federal Regulators Consider Casino's Impact on Coast*, MISS. BUS. J., May 9, 1994, at 1.

highway, a ten-acre lake, and other facilities. Future plans call for a 300-room hotel, country and western dance hall, restaurant, retail space and administrative offices.⁴⁰¹ There are also parking lots, roads, channels, sewer systems, electrical systems, garbage dumps and more.⁴⁰² All of this puts a strain on the surrounding environment.

Ironically, by requiring that all casinos be placed on navigable water, the state created a much more serious environmental problem than if the casinos were located in developed areas. Originally, all of the casinos on the Coast were located on shoreline areas that were classified as commercial or industrial.⁴⁰³ While there were concerns about surrounding wetlands, these areas were not that environmentally sensitive, because they had been subject to development for many years. However, as more casinos moved in, and commercial locations became scarce, applicants sought to introduce casinos into the bays and adjunct waterways that were classified for residential and recreational uses.⁴⁰⁴ These new locations are far more environmentally sensitive than the earlier sites.⁴⁰⁵ The Environmental Protection Agency, the National Marine Fisheries Service, and the Fish and Wildlife Service have now all called for a moratorium on the issuance of further permits until an Environmental Impact Statement is done on the cumulative impact of dockside gambling on the Coast.⁴⁰⁶

In addition to problems that are created when casinos are

⁴⁰¹ Williamson, *supra* note 14, at 46. The Sheraton Corporation, according to company figures, will also spend more than \$200 million building the casino vessels. *Id.* The finished project will employ 2000 people with an annual payroll of about \$46 million and is expected to generate an additional 1000 indirect jobs with a yearly payroll of \$15 million. *Id.* It will also contribute about \$23 million annually into state and county tax coffers. *Id.*

⁴⁰² *Id.* The parking lot alone will accommodate 4000 vehicles covering 45 acres. *Id.*

⁴⁰³ Ellen Peel, *Mississippi "Gamble" Could Cost Fish, Wetlands*, MARINE CONSERVATION NEWS, Summer 1994, at 5.

⁴⁰⁴ Peel, *supra* note 403, at 5.

⁴⁰⁵ *Id.* The Gulf of Mexico is second only to Alaska in fish productivity, and 98% of the commercial fish caught in the Gulf depend on these coastal estuaries at some point in their life cycle. *Id.*

⁴⁰⁶ *Id.*

built, the State is beginning to experience environmental problems associated with their departure.⁴⁰⁷ Thus far there has not yet been any major permanent damage to the environment.⁴⁰⁸ However, by mid-1994 two casinos had pulled out of Tunica County, a third had shut down and announced plans to leave, and other projects had been left unfinished, all of which lead to erosion gullies, abandoned barges, and a paved and dramatically altered floodplain.⁴⁰⁹ The large, empty parking lots may represent the primary environmental concern.⁴¹⁰ If casino sites are eventually abandoned and ghost towns are left in their wake, who will care for the land, and what will happen to it?

One of the particular environmental concerns with casinos relates to how the permitting process has been handled. Under the Clean Water Act, developers must apply for permits to discharge any dredged or fill material into navigable water.⁴¹¹ Since Mississippi casinos must be on water (the term "navigable" has lost most of its meaning),⁴¹² permits are needed for each casino project.⁴¹³ The United States Army Corps of Engineers proposed a plan to allow casino projects to leap-frog over governmental regulation procedures designed to protect the environment, and acquire in as few as five days permits that normally take up to six months to obtain.⁴¹⁴ The Corps is

⁴⁰⁷ Charlier, *supra* note 209, at B1.

⁴⁰⁸ *Id.* Mississippi environmentalist groups have been critical of the gaming development. *Id.* Peter Schutt, founder of the Mississippi River Coalition, said that "[w]hether you call it destruction or not, it's obviously not good for the flood plain." *Id.*

⁴⁰⁹ *Id.* At present, Mississippi lawmakers are considering legislation requiring performance bonds for future gaming developments. *Id.* This money could be used to clean up sites that are abandoned or left unfinished. *Id.*

⁴¹⁰ *Id.* Rain falling on the pavement cannot be absorbed, so it runs off the lot in fast moving streams, cutting the earth and eroding the soil. *Id.*

⁴¹¹ 33 U.S.C. § 1344 (1988).

⁴¹² See *Cinque Bambini v. State*, 491 So. 2d 508, 516 (Miss. 1986) (defining navigable as if one could "hoist a sail upon a toothpick"), *aff'd sub. nom.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

⁴¹³ Choctaw casinos, of course, do not have to be on navigable water. See *supra* notes 184-89 and accompanying text.

⁴¹⁴ *Why are Casinos Special?*, COM. APPEAL (Memphis), May 6, 1994, at A16.

issuing the permits for wetland destruction under the assumption that the casinos are "water dependent" under the Clean Water Act.⁴¹⁵ This permits greater use of water and destruction of wetlands than would otherwise be possible.⁴¹⁶ State law, of course, requires that they be placed on water, but they are not water dependent in the traditional sense.⁴¹⁷

Another issue tied to the permitting process and abandonment of casino sites involves mitigation. When casino developers get Clean Water Act permits, they are usually required to mitigate the damage by restoring or developing wetlands elsewhere.⁴¹⁸ According to Corps reports issued in 1994, twenty-three active and proposed casino sites in Tunica and Coahoma counties involve the filling of 128.13 acres of wetlands.⁴¹⁹ To mitigate that damage, developers agreed to develop 165.5 acres of mitigation wetlands.⁴²⁰ Of course, if developers abandon a site, they might not carry through with the long-term efforts required to fulfill mitigation obligations.⁴²¹

In order to prevent this from being a problem in the future, legislation requiring performance bonds which would cover cleanup costs at sites that are abandoned has been discussed during recent hearings in Jackson.⁴²² In the absence of a bond

⁴¹⁵ Williamson, *supra* note 14, at 46.

⁴¹⁶ See *Friends of the Earth v. Hintz*, 800 F.2d 822, 831-32 (9th Cir. 1986) (discussing concept of water dependency). As this article went to print, the Mississippi River Coalition, an environmental group, filed suit against the Corps of Engineers claiming that the Corps had allowed casino developers in North Mississippi to damage an important wetland area. See Tom Charlier, *Lawsuit hits corps' casino permits*, COM. APPEAL (Memphis), April 1, 1995, at B1.

⁴¹⁷ *Friends of the Earth*, 800 F.2d at 831-32. A water-dependent activity is one requiring "access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose." *Id.* at 831 (quoting 40 C.F.R. § 230.10(a)(3) (1986)).

⁴¹⁸ This is in keeping with former President Bush's pledge of "no net loss" of wetlands. See Ronald J. Rychlak & Ellen M. Peel, *Swimming Past the Hook: Navigating Legal Obstacles in the Aquaculture Industry*, 23 ENVTL LAW 837, 849 (1993) (discussing various state approaches to wetland conservation).

⁴¹⁹ Charlier, *supra* note 209, at A1.

⁴²⁰ *Id.*

⁴²¹ *Id.* Abandoned sites have not posed a problem yet because they are all on sites covered by permits for group developments. *Id.*

⁴²² *Id.* State Sen. Mike Gunn (R-Jackson), chairman of the Senate Environment

requirement, the Corps of Engineers, as a condition of issuing permits, has recently started requiring developers to make up-front pledges to clean up any site they abandon.⁴²³ Casino officials, of course, resent these additional impositions. They point to the lack of problems so far and the fact that other businesses are not subjected to similar requirements.⁴²⁴ Nevertheless, if abandonment causes problems, and the casinos are truly at fault, responsible state officials must make provisions for ultimate clean-up of abandoned sites.

A different type of environmental concern relates to the safety of those who must travel to, from, or near the casinos, especially those in northern Mississippi. The primary route between Memphis and Tunica is U.S. 61, a two-lane highway described (before the casinos) in John Grisham's book, *The Chamber*.⁴²⁵ Since the casinos came, traffic has tripled and it has been called "an auto-body shopman's greatest dream,"⁴²⁶ "the state's worst gamble,"⁴²⁷ and a "death trap."⁴²⁸ In January, 1994, four casino employees were killed driving on that highway.⁴²⁹ Plans are underway to improve and make it safer, and casino developers are even looking at the possibility of building a private access road to provide a shortcut from Memphis,⁴³⁰ but with gamblers returning home after having been

Committee, said the bond is especially important because the State's gaming law restricts casinos to sites on water, which "by definition are environmentally sensitive areas." *Id.* The outcome is not, however, clear. "At this point, with all the difficulties in the industry, I don't see the Legislature coming out with anything that's going to be a hardship for the industry." *Id.* (quoting Barbara Shattles, director of corporate marketing for Treasure Bay Corporation, which has casinos in Biloxi and Tunica County).

⁴²³ *Id.* The new policy, however, does not affect developments previously permitted. *Id.*

⁴²⁴ Charlier, *supra* note 209, at A1. The casino owners are of the opinion that they have adhered to the strict environmental requirements. *Id.*

⁴²⁵ GRISHAM, *supra* note 139, at 63.

⁴²⁶ Smith, *supra* note 109, at 1.

⁴²⁷ *Id.*

⁴²⁸ Snyder, *supra* note 137, at A1.

⁴²⁹ *Id.* In 1989 there were only two fatalities recorded on Tunica roads the entire year. *Id.*

⁴³⁰ Wilkie, *supra* note 107, at 14.

served free drinks most of the night, U.S. 61 continues to be a very risky road.

In Biloxi, environmental concerns relate primarily to the strains that the casinos have put on public services. With 2000 new hotel rooms being built along Biloxi's casino row, local water and sewer systems are being overtaxed, and the city has had to pour money into infrastructure improvements.⁴³¹ The state itself will sell \$325 million in construction bonds to widen highways in areas of the Gulf Coast casinos.⁴³² All of this development, of course, comes at a cost. As one state traveler put it:

And I kept insisting how much better it all looked before the gambling gods ruled Mississippi.

The casinos have cast their long neon shadow over much of the beach between New Orleans and Biloxi. One of them hosts a nightly laser show so spectacular that it confuses the pilots at Keesler Air Force Base.⁴³³

As historian Gordon Cotton said, "My starlit skies have been infringed upon."⁴³⁴

The National Trust for Historic Preservation, a Washington-based preservation watchdog group chartered by Congress, named Natchez one of its "eleven most endangered historic places" in June, 1994, citing the threat of casino development on the bluff.⁴³⁵ Even though the casinos do not yet dominate the skyline the way they do on the Coast, the fear is that casinos will lead to development and the historic character of Natchez will be lost. Some already feel that Natchez has changed "from something authentic to something plastic."⁴³⁶

⁴³¹ Walters, *supra* note 13, at 11.

⁴³² *Safe Bet*, *supra* note 126.

⁴³³ Rheta G. Johnson, *On the Road With a Good Neighbor*, ATLANTA J. & CONST., May 29, 1994, at C1.

⁴³⁴ Swick, *supra* note 153, at C7 (complaining about nightly searchlights at Ameristar Casino in Vicksburg).

⁴³⁵ Sullivan, *supra* note 11, at A1.

⁴³⁶ *Id.* (quoting History Professor Ronald L. Davis of California State University at Northridge, regular visitor to Natchez for past 20 years).

It's like Brigadoon, the magical town that came to life once every 100 years in the musical by Lerner and Loewe. You don't know if it's real, but you know that it was once real. The tawdriness and crassness of this gambling activity threatens the magic of all that.⁴³⁷

Critics say that "a gracious, slow-paced way of life is disappearing in a city that, away from the touristy beach, still has white-columned mansions and canopies of live oaks and hanging Spanish moss along many of its streets."⁴³⁸ Not everyone agrees. According to Natchez Mayor Larry W. "Butch" Brown, Natchez now has some of the toughest historic preservation guidelines in the country. He agrees that Natchez is endangered, "but I don't think it's endangered by gaming."⁴³⁹

All of this development comes at a cost that some other states have found too high. In a 1977 article, then New Hampshire Attorney General David Souter argued that gambling would attract tourists to that state (which already had a lottery) for the thrill of gambling instead of the beauty of the state's mountain scenery.⁴⁴⁰ He said gambling "would change the character of the part of the world closest to us."⁴⁴¹ The New Hampshire gambling proposal, which was endorsed by then Governor Meldrin Thomson, Jr. ultimately failed.⁴⁴² Mississippians may be more willing to accept changes in our geography and the character of our communities, but we must recognize the consequences of our actions when we invite casinos into the neighborhood. It is another cost that must be considered.

⁴³⁷ *Id.* (quoting Professor Davis).

⁴³⁸ Beebe, *supra* note 12, at A1. One resident, whose yard now floods each time it rains said, "It's done; it happened; there's no use squawking about it." *Id.*

⁴³⁹ Sullivan, *supra* note 11, at A1. The Giles Cutoff north of town, created in the 1930s by the Corps of Engineers, changed the angle at which the river passes Natchez. *Id.* Over the past 60 years, approximately eight square blocks have been washed away. *Id.* At present, there is a \$70 million bluff stabilization plan being considered by Congress. *Id.*

⁴⁴⁰ Eldridge, *supra* note 372.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

XIII. CONCLUSION

A couple of years ago, before Mississippi and other states had turned to casino gambling, the most interesting feature of modern state-sanctioned gambling was that it went "from universal prohibition and condemnation of all forms of gambling to state sponsorship of lotteries, [and] completely bypassed the logical step of legalized (but unsponsored) gambling."⁴⁴³ Mississippi has taken that "logical step," and while there are serious social consequences, the economic results have thus far been about as positive as any gambling proponent could have hoped for. Gambling has not only added a tremendous amount of money to state coffers in the past two years, it has pulled some communities out of dire economic situations. Significantly, it has done this without the state becoming directly involved in the operation of a gambling enterprise (such as a lottery).

For the time being, Mississippi is benefiting from an influx of money from neighboring states, but that is likely to slow down or stop when they, too, move toward legalized gambling. Moreover, Mississippi has not yet begun to see the full effects of legalized gambling on individuals. Crime, bankruptcy, homelessness, domestic problems and membership in Gamblers Anonymous have all grown markedly since the introduction of gambling in the state. These trends are almost certain to continue.

Mississippi must prepare to deal with the negative impact that casino gambling will have in the near future. It is time to act on these issues. Public education campaigns, treatment centers, and additional help for social services are all likely to be required in the near future. The State will also have to face the likelihood of more teenagers with gambling problems and continued increases in the level of criminal activity. Special consideration for the environment may also be necessary.

As all of these issues evolve over the next few years, it will be important to remember the observed correlation between these problems and legalized casino gambling. History suggests

⁴⁴³ Rychlak, *supra* note 16, at 47-48.

that this wave of legalized gambling in America will not last forever. Hopefully, Mississippi will be able to capitalize on its early entry into the gambling arena to pull itself out of its historical poverty. When gambling starts to become a drain on the state, as history indicates it inevitably will, let us hope that Mississippians are among the first to recognize that trend as well.

SITE APPROVAL OF CASINOS IN MISSISSIPPI—A MATTER OF STATUTORY CONSTRUCTION, OR A ROLL OF THE DICE?

Ben H. Stone, J. Adrian Smith,**
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Thomas L. Carpenter, Jr.*****

I. INTRODUCTION

Prior to the War Between the States, Mississippi's economy boomed will cotton as the king. Along with the cotton industry, the shipping trade prospered along the Mighty Mississippi, and, to a lesser extent, along the Gulf Coast. The same spirit of adventure and quest for personal gain that conquered the western United States also pervaded Mississippi during its heyday. The profitable cotton trade and the adventurous spirit of the day created an attractive setting for games of chance. Gambling halls offering such entertainment soon sprung up in places such as Natchez, Biloxi, and elsewhere.

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After the Civil War had reduced Mississippi's economy to shambles and the cotton trade no longer commanded the power it once enjoyed, the gambling halls either disappeared entirely or went underground, Prohibition-style.¹ During this time casino gaming was illegal, and a gambler could practice his trade only in the smoky back rooms of certain restaurants and cocktail lounges, and only at the pleasure of the local authorities.²

Las Vegas' success story, combined with the crackdown on organized crime, dimmed the attraction of Mississippi's illegal gaming dens. Although they enjoyed popularity through the 1960's, Mississippi practically rid itself of illegal gaming over the next several decades, with the exception of a few locations in the Mississippi Delta.³

The late 1980's brought to some citizens of Mississippi an openness to and tolerance of casino gaming. This article will discuss the resulting passage of the Mississippi Gaming Control Act and its subsequent development and interpretation for both the Mississippi River and Gulf Coast regions. Additionally, this article will examine the right of casino interests and third parties to appeal siting decisions of the Mississippi Gaming Commission.

II. THE LEGALIZATION OF DOCKSIDE GAMING IN MISSISSIPPI—BUT WHERE?

Under mounting pressure to stimulate Mississippi's flagging economy, the Mississippi Legislature embraced the concept of legalized casino gaming. When properly regulated, this industry is celebrated for its propensity to fill the coffers of any jurisdiction where present, thereby alleviating the budgetary shortcomings of both state and local governments, without resorting to increased taxes, decreased services, or discontin-

¹ See JOHN K. BETTERSORTH, *MISSISSIPPI YESTERDAY AND TODAY* 187-88 (1964); HARTNET T. KANE, *NATCHEZ ON THE MISSISSIPPI* 125-33 (1947).

² *Mississippi in 1951*, 14 J. MISS. HIST. 141 (1952).

³ HARRIET DECELL & JOANNE PRICHARD, *YAZOO: ITS LEGENDS AND LEGACIES* 177 (1976).

ued programs.⁴ Cognizant of these attributes, the Legislature passed the Mississippi Gaming Control Act, thereby legalizing gaming in the state on June 29, 1990.⁵ However, as a compromise to those who opposed legalized gaming, limitations were placed on the locations where such gaming would be permitted. Recognizing that the Mississippi River and the Mississippi Gulf Coast were traditionally the sites where casino gaming had taken place (albeit illegally), the Legislature drafted the Act so as to legalize gaming only in those areas. Specifically, casino gaming was legalized only:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(c) That is legal under the laws of the State of Mississippi.⁶

⁴ James Popkin, *A Mixed Blessing for "America's Ethiopia"*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 52-53.

⁵ Mississippi Gaming Control Act, Ch. 45, 1990 Miss. Laws 48 (extraordinary session) (codified at MISS. CODE ANN. §§ 75-76-1 to -281 (1991 & Supp. 1994)). This act was patterned after the Nevada Gaming Control Act. NEV. REV. STAT. §§ 463.010-720 (1994).

⁶ MISS. CODE ANN. § 97-33-1 (1994); *see also* MISS. CODE ANN. § 97-33-7 (1994) (defining legal locations of gaming devices); *Id.* § 97-33-17 (exempting legal gaming from seizure rules); *Id.* § 97-33-25 (exempting legal gaming from pool-selling penalties); *Id.* § 97-33-27 (exempting legal gaming from sanctions for horse race, yacht race, and shooting-match betting, and exempting legal gaming establishments from alcohol permit revocation provision); *Id.* § 87-1-5 (exempting legal gaming from provision allowing loser of wagering to sue for recovery of property lost).

"Cruise vessels" and "vessels" were defined as follows:

[T]he term "cruise vessel" shall mean a vessel which complies with all U.S. Coast Guard regulations, having a minimum overall length of one hundred fifty (150) feet and a minimum draft of six (6) feet and which is certified to carry at least two hundred (200) passengers; and the term "vessel" shall mean a vessel having a minimum overall length of one hundred fifty (150) feet For the purposes of a "vessel" as that term is defined in this section, "navigable waters" means any rivers, creeks, bayous or other bodies of water within any county in this state bordering on the Mississippi River that are used or susceptible of being used as an artery of commerce and which either in their natural or improved condition are used or suitable for use as an artery of commerce or are used for the docking or mooring of a vessel, notwithstanding interruptions between the navigable parts of such rivers, creeks, bayous or other bodies of water by falls, shallows, or rapids compelling land carriage.⁷

By passage of the above statutes, the Legislature made possible dockside gaming along the Mississippi River and the Mississippi Gulf Coast. The citizens of any county bordering the Mississippi River or the Mississippi Gulf Coast may legalize dockside casino gaming by county-wide referendum.⁸ Note,

⁷ *Id.* § 27-109-1(2).

⁸ *Id.* § 19-3-79.

The ballots used at such election shall have printed thereon a brief statement of the purpose of the election and the words "FOR LEGAL GAMING ABOARD CRUISE VESSELS (OR VESSELS) IN THE COUNTY AS PRESCRIBED BY LAW," and "AGAINST LEGAL GAMING ABOARD CRUISE VESSELS (OR VESSELS) IN THE COUNTY AS PRESCRIBED BY LAW."

Id. § 19-3-79(4). Under certain circumstances, a county's board of supervisors will adopt a resolution authorizing gaming in that county and legal gaming may henceforth be conducted in that county without an election. *Id.* § 19-3-79(2).

Gaming has been authorized by one of the above methods in the following counties: Tunica (Nov. 5, 1990), Adams (Nov. 27, 1990), Hancock (Dec. 4, 1990), Claiborne (Feb. 4, 1991), Issaquena (Mar. 26, 1991), Harrison (Mar. 10, 1992), Washington (Mar. 31, 1992), Warren (Sept. 8, 1992), and Coahoma (Aug. 24, 1993).

however, that before the Mississippi Gaming Commission will license a prospective dockside casino site, the site must be deemed "suitable" for the conduct of gaming operations.⁹ Such suitability is dependant upon a number of factors unrelated to the legality of the gaming site pursuant to the Gaming Control Act.¹⁰ Indeed, as a practical matter, licensure is also depen-

⁹ Miss. Gaming Comm'n Reg. II.B. § 1 at 42-43 (1991).

¹⁰ The Legislature vested authority in the Mississippi Gaming Commission to adopt regulations in order to carry out its public policy goals, including "[d]efining and limiting the *area*, games and devices permitted, and the method of operation of such games and devices" MISS. CODE ANN. § 75-76-33(2)(j) (1991) (emphasis added). The Commission thereby enacted Regulation II.B. § 1 which states:

Unsuitable Locations. The Executive Director may recommend that an application for a license be denied if the Executive Director believes that the place or location for which the license is sought is unsuitable for the conduct of gaming operations. The Commission may deny an application for a state gaming license if it deems that the place or location for which the license is sought is unsuitable for the conduct of gaming operations.

Without limiting the generality of the foregoing, the following places or locations may be deemed unsuitable:

- (a) Premises located within the immediate vicinity of residential areas, churches, schools and children's public playgrounds.
- (b) Premises where gaming is contrary to any county or city[] ordinance, including, but not limited to, zoning ordinances restricting the permissible locations for gaming facilities, so long as such ordinances do not have the effect of absolutely excluding or prohibiting legal gaming.
- (c) Premises which fail to meet federal, state or local health and safety standards, and any other applicable laws or regulations including, but not limited to Coast Guard regulations.
- (d) Premises frequented by minors. The Executive Director may recommend and the Commission may determine that premises frequented by minors are nevertheless suitable if the applicant demonstrates that it has taken sufficient precautions to separate areas of the premises frequented by minors from the gaming operation.
- (e) Premises lacking adequate supervision or surveillance.
- (f) Premises difficult to police, or where adequate fire protection may be difficult.
- (g) Any other premises where the conduct of gaming would be inconsistent with the public policy of the State of Mississippi.

Miss. Gaming Comm'n Reg. II.B. § 1 at 42-43 (1991).

The Circuit Court of Harrison County, Mississippi, has held that a gaming site's legality under the applicable statutes is separate and distinct from a factual finding of the site's suitability. Findings of Fact and Conclusions of Law at 20,

dent upon a casino venture's ability to obtain various environmental permits from those environmental agencies vested with jurisdiction over the particular location.¹¹ A discussion of these processes, however, is regrettably beyond the scope of this article.

III. DOCKSIDE GAMING ON THE MISSISSIPPI GULF COAST—SOUTH OF THE THREE MOST SOUTHERN COUNTIES?

A. *The Franckiewicz Opinion and Regulation No. 2*

As heretofore discussed, the Mississippi Gaming Control Act permits casino gaming "in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi"¹² Although "the three most southern counties in the State of Mississippi" are capable of precise definition (Hancock, Harrison and Jackson Counties), the meaning of the remainder of this legislative enactment is less than certain. Strict interpretation of the express language of this statute presents an impossible situation—since waters cannot be both "within" and "adjacent" to the State of Mississippi, nor exist both "south of the . . . counties" and "within" the State of Mississippi, since the southern boundary of the southernmost counties runs concurrently with the southern boundary of the State of Mississippi. Indeed, the Circuit Court of Hinds County has noted that "a strict interpretation of [section 97-33-1(a)] as written would be impossible."¹³

Shortly after its enactment, this statute's inherently ambiguous and self-contradictory nature prompted Senator Vic Franckiewicz, Jr.,¹⁴ to request an interpretive opinion from

Board of Educ. v. Mississippi Gaming Comm'n (Cir. Ct. of Harrison County, Miss., Dec. 30, 1994) (No. A-2401-94-00211).

¹¹ These agencies include the United States Army Corps of Engineers, the Mississippi Department of Marine Resources, and the Mississippi Department of Environmental Quality.

¹² MISS. CODE ANN. § 97-33-1(a) (1994).

¹³ Order at 1, Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n (Cir. Ct. of the 1st Jud. Dist. of Hinds County, Miss., Feb. 3, 1994) (No. 93-77-269).

¹⁴ Senator Franckiewicz lived in and represented the people of Bay St. Louis,

the Mississippi Attorney General. Specifically, Senator Frankiewicz inquired whether dockside gaming was legal on the Mississippi Gulf Coast (a) within its bays and coastal indentations,¹⁵ and, if so, how far into these waters; (b) on the various rivers, streams, and bayous in the three coastal counties; and (c) in artificially-created inlets or harbors connecting to waters which are themselves legal.¹⁶ The Attorney General responded with an Official Opinion on August 29, 1990, which found that:

[T]he Legislature intended to allow gambling activities on cruise vessels moored along the waterfront of the Mississippi Gulf Coast, even though that waterfront is not technically "adjacent to the State of Mississippi south of the three (3) most southern counties."

Having reached this conclusion, though, we still confront the problem of defining precisely where the "waterfront of the Mississippi Gulf Coast" begins and ends. As your series of questions indicates, the line is not a clear one, with numerous bays, estuaries, inlets, rivers and man-made bodies present. Some waterfront areas, such as the larger bays (St. Louis Bay, Biloxi Bay, Pascagoula Bay) are clearly included in the Legislative intent. The rivers and bayous leading into these bays, included but not limited to the Jourdan River, Wolf River, Bernard Bayou, Tchoutacabouffa River, Pascagoula River and Escatawpa River, are just as clearly not included. However, the precise boundaries between the bays and these tributaries are a matter of factual dispute.¹⁷

Therefore, the guidelines subsequently followed by the Mississippi Gaming Commission provided that dockside gaming

in Hancock County, Mississippi.

¹⁵ Including Heron Bay, St. Louis Bay, Biloxi Bay, Back Bay of Biloxi, the waters of the mouth of the Pascagoula River, and Pt. Aux Chenes Bay.

¹⁶ Dockside Gambling, Op. Miss. Att'y Gen. at 1-2 (Aug. 29, 1990) (No. 90-416) 1990 WL 548075 (Miss. A.G.), *microformed on Reports and Opinions of the Attorney General* (William S. Hein & Co., Inc.) [hereinafter *Franckiewicz Opinion*].

¹⁷ *Id.* at 2-3.

was permissible in the larger bays¹⁸ of the Mississippi Gulf Coast, but that the rivers and bayous leading into these bays were *verboden*. However, Senator Franckiewicz's third inquiry regarding artificial improvements to otherwise legal waters was not directly answered. The opinion did not include artificially created inlets and harbors in its description of water bodies it labeled as "clearly not included" in the legislative intent. The Franckiewicz Opinion in no way precludes the finding of an artificially created inlet or harbor as a legal location for dock-side gaming.

Importantly, the Franckiewicz Opinion deferred the responsibility of site-legality decisions to the Mississippi Gaming Commission. When addressing the issue of the suitability of individual sites under this interpretation, the Franckiewicz Opinion stated:

It is beyond the province of this office to make such a factual determination. Such a finding is peculiarly legislative in nature, and the responsibility for such a determination must remain with the State Legislature. Of course, the Legislature is free to delegate this responsibility to an administrative agency. . . .

[I]t is the opinion of this office that the State Legislature has delegated to the State Tax Commission [the predecessor

¹⁸ A bay is defined as

an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean . . . an inlet of the sea, usually smaller than a gulf, but of the same general character. The name is used, often for large tracts of water, around which the land forms a curve, or for any recess or inlet between the capes or headlands . . . an indentation of the sea into the land with a wide opening, . . . a wide opening or indentation in a coast line.

People v. Stralla, 96 P.2d 941, 942 (Cal. 1939). Courts have used a spacial test to distinguish, when necessary, between an ocean and a bay. Under the spacial test, a curvature of a coast will not be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle the diameter of which is a line drawn across the mouth of that indentation. *United States v. Maine*, 469 U.S. 504, 514 (1985); *United States v. Louisiana*, 394 U.S. 11, 48 (1969); *United States v. California*, 381 U.S. 139, 169 n.36 (1965).

to the Mississippi Gaming Commission] the responsibility for precisely defining, within the statutory parameters previously noted, the waters within which dockside and cruise ship gambling may occur.¹⁹

In an effort to bestow a binding effect on the Attorney General's interpretation of section 97-33-1 of the Mississippi Code in the Franckiewicz Opinion,²⁰ the Mississippi Gaming Commission adopted Regulation No. 2 on November 14, 1990, as follows:

MISSISSIPPI GAMING COMMISSION
REGULATION NO. 2

(As Promulgated 11/14/90)

LOCATIONS WHERE VESSELS CAN OPERATE

Cruise Vessels:

Waters within the State of Mississippi which lie adjacent to the three (3) most southern counties of the State. In addition to the Mississippi Sound, this would include St. Louis Bay, Biloxi Bay and Pascagoula Bay. However, the rivers and bayous leading into these bays, including but not limited to the Jourdan River, Wolf River, Bernard Bayou, Tchoutacabouffa River, Pascagoula River and Escatawpa [River] are not within the authorized area. In determining where the river ends and the bay begins, an imaginary line shall be drawn from the foremost land mass at the intersection of the river and the bay, straight across the river to the foremost land mass of the intersection on the other side.

....

Any person desiring a determination as to whether a particular location is authorized under the above criteria, can make a request for such a decision on forms provided by the Executive Director.²¹

¹⁹ Franckiewicz Opinion, *supra* note 16, at 3.

²⁰ Opinions of the Mississippi Attorney General are merely advisory and do not carry the force of law. *Frazier v. Lowndes County Bd. of Educ.*, 710 F.2d 1097, 1100 (5th Cir. 1983); *Local Union No. 845, United Rubber, Cork, Linoleum & Plastic Workers, Home Assoc. v. Lee County Bd. of Supervisors*, 369 So. 2d 497, 498 (Miss. 1979).

²¹ Miss. Gaming Comm'n Reg. No. 2 (1990).

The text of the Franckiewicz Opinion and Regulation No. 2 are so similar as to safely assume that the Gaming Commission patterned the latter after the former.

Having set the stage, the Gaming Commission began the process of conducting site reviews for those locations on the Mississippi Gulf Coast with gaming applications pending. Gaming was authorized by local option in Hancock County on December 4, 1990, and Harrison County followed suit on March 10, 1992.²² The initial site approval hearings involving Gulf Coast sites were non-controversial, as the vast majority of proposed gaming sites under review were on the front beach in Harrison County south of Highway 90. However, controversy was soon to strike the Commission's review of potential gaming sites.

B. The Ladner Site—Does Bayou Caddy Qualify as a Legal Gaming Site Under Regulation No. 2?

On December 17, 1990, a request was made on behalf of Terryl M. Ladner and Terry's Seafood, Inc.²³ to the Mississippi State Tax Commission²⁴ for an opinion as to whether the Ladner property bordered by Bayou Caddy in Hancock County would qualify as a site for a gaming license. The site in question was described by its proponents as

located in Hancock County south of the City of Waveland at the end of Beachfront Road which dead-ends into that body of water commonly known as Bayou Caddy The property is located some few hundred yards west of the end of Beachfront Road and is bordered on the south end of the property by a body of water known as Bayou Caddy.²⁵

²² Jackson County has yet to authorize dockside gaming.

²³ Brief of Plaintiffs at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 3, 1992) (No. 11,257) [hereinafter collectively *Ladner*].

²⁴ The Mississippi State Tax Commission temporarily exercised the duties of the Mississippi Gaming Commission until October 1, 1993. MISS. CODE ANN. § 75-76-7(1) (1991).

²⁵ Brief of Plaintiffs at 4, *Ladner* (No. 11,257).

The site was further described as

located on the last land mass contiguous with upland Mississippi If a person gets in a car anywhere in Mississippi and drives to Hancock County, the furthest south he or she can go in that car in that area of Hancock County is the Ladner site. South of the Ladner site is water, and lots of it at high tide.

South of the water is Point Clear Island which is exactly that, an *island*. To get to Point Clear Island from Jackson or anywhere in Mississippi, one drives to Hancock County and, from the Ladner site or nearby property, takes a *boat* or *swims*. One cannot walk to Point Clear Island from the Ladner property any more than a person can walk from Pass Christian to Cat Island. [A former Executive Director and a Commissioner of the Mississippi State Tax Commission] went *around* Point Clear Island in a *twenty-foot* boat ²⁶

Ladner thus contended that because Bayou Caddy is bordered on the south by swamplands, with the exception of Point Clear Island, and because Point Clear Island was once part of the chain of barrier islands located off the coast of Mississippi, Bayou Caddy is not a bayou, but the Mississippi Sound.²⁷

The Mississippi Gaming Commission, on several separate occasions,²⁸ found as a matter of fact that the body of water upon which the Ladner site was situated, Bayou Caddy, was indeed a bayou, and thus did not meet the requirements of a

²⁶ *Id.* at 6-7.

²⁷ Brief of the Appellants at 5, Mississippi Gaming Comm'n v. Ladner (Miss., Nov. 7, 1994) (No. 94-TS-0299). For a depiction of the geographical features of the subject area, see United States Coast and Geodetic Survey, *Grand Isle Pass, Miss.-La.* (Map), 1:24,000, 7.5 minute series (topographic), 30089-B4-TF-024 (1956, photorevised 1970 & photo inspected 1976).

²⁸ The Gaming Commission initially rejected the Ladner site at its meeting on January 3, 1991, again denied site approval on October 30, 1991, subsequent to a request for a hearing on the matter and the presentation of additional evidence, and, after the Circuit Court of Hancock County ordered that the matter be "remanded to the Mississippi Gaming Commission for further proceedings, including a rehearing on plaintiff's request for preliminary site approval," further refused to approve the Ladner site for gaming. Brief of Plaintiffs at 1-3, *Ladner* (No. 11,257); Brief of the Appellants at 2-4, *Ladner* (No. 94-TS-0299).

legal gaming site as set forth in the Gaming Control Act and Regulation No. 2.²⁹ On July 6, 1992, Ladner appealed the decision of the Mississippi Gaming Commission to the Circuit Court of Hancock County.³⁰

On appeal, Ladner argued two main points. First, Ladner presented testimony of a geologic expert that described the formation of the barrier islands of the Mississippi Gulf Coast (from east to west, Petit Bois, Horn, Ship, Cat, Point Clear and Campbell Islands), and the geologic processes whereby "the area between Point Clear and Campbell Islands and the mainland shore (outlined by the Magnolia Ridge) became the narrow western extension of the Mississippi Sound."³¹ Ladner thus argued that since the site in question fronts on this western extension of the Mississippi Sound, and the Mississippi Sound is specifically set forth in Regulation No. 2 as a permissible location for a gaming vessel, the property site qualified as a legal gaming site.³²

Second, Ladner identified an apparent loophole in Regulation No. 2—although gaming sites on "the rivers and bayous leading into these bays [identified as St. Louis Bay, Biloxi Bay and Pascagoula Bay] . . . are not within the authorized area," those rivers and bayous emptying into the Mississippi Sound itself were not expressly prohibited. Ladner therefore argued:

[T]he facts as presented to the Gaming Commission are that the water from that area between the Ladner property and Point Clear Island connects with the Mississippi Sound to the east. *There is no exclusion in Regulation No. 2 for a bayou or any water body which enters into the Mississippi Sound.* Only the rivers and bayous leading into the three enumerated bays are not authorized areas under Regulation No. 2.³³

Therefore, Ladner concluded that his site qualified under Regulation No. 2 whether classified as (1) being actually on the Mis-

²⁹ Brief of the Appellants at 2-4, *Ladner* (No. 94-TS-0299).

³⁰ *Id.* at 4.

³¹ *Id.* at 11.

³² See Brief of Plaintiffs at 11, *Ladner* (No. 11,257).

³³ *Id.* at 10 (citations omitted).

Mississippi Sound, or (2) on a bayou emptying into the Mississippi Sound.

The Mississippi Gaming Commission, represented by the Attorney General,³⁴ countered Ladner's arguments by supporting its administrative decision to deny Ladner site approval. "The record is replete with evidence . . . that properly adopted regulations prohibit gaming on bayous, that the Commission interprets the law as prohibiting gaming on bayous, that Bayou Caddy is not the Mississippi Sound, and that a landmass exists on both sides of Bayou Caddy."³⁵

³⁴ By statute, the Attorney General represents and advises the Gaming Commission. MISS. CODE ANN. § 75-76-25 (1991).

³⁵ Brief of Appellees at 7, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 24, 1992) (No. 11,257). The Gaming Commission identified such evidence as follows:

1. Application for preliminary site approval "points out that Bayou Caddy is a salt water Bayou and not a fresh water Bayou[.]"

2. Report of Investigator for Mississippi State Tax Commission describes the site as "2400 feet inland from the MS Sound," cites the United States Geological Survey Map as showing landmasses of either side of Bayou Caddy at the bayou's mouth and expressing the investigator's opinion "that the proposed location does NOT meet the requirements set forth in the regulations, . . . [the] regulations specifically do not authorize operation of a cruise vessel in a bayou[.]"

3. Ladner's testimony that Point Clear Island is "surrounded by marsh[.]" that one must follow bayous to go around Point Clear, and that the site that photos were taken was 1500' from the Sound and 1100' eastward of the actual site.

4. Joan Evelyn Bernard's testimony that the Mississippi Sound begins at the mouth of Bayou Caddy, and the Mississippi Sound is the open water past the mouth of Bayou Caddy.

5. Testimony of Dr. Ervin Otvos that marshlands south of Bayou Caddy are a filled-in extension of the Mississippi Sound, and are a "transitional area and it would be just as hard to define, geologically speaking, where the sound ends and the interior marshlands start[.]"

6. United States Department of the Interior Grand Island Pass Quadrangle map locating shore line south of Point Clear Island.

7. United States Coastal Survey Chart No. 371, attached to Dr. Otvos' report, showing that "present shore" is located on seaward side of marshlands.

8. Hearing officer[s] recommendation to deny preliminary site approval because "the proposed location does not qualify as a suitable site under the provisions of the Mississippi Gaming Control Act, Miss. Code Annot. § 97-33-7, or Mississippi Regulation No. 2 . . . and that site is a

On April 5, 1993, the Circuit Court of Hancock County, the Honorable James E. Thomas presiding, rendered an Order in Ladner's favor, finding that:

[T]he Ladner site on Bayou Caddy which is the subject of this litigation is qualified for gaming activities under Mississippi law. This Court finds that Mississippi Gaming Commission Regulation No. 2 does not prohibit the location of a gaming facility on a bayou emptying directly into the Mississippi Sound. Evidence was uncontradicted that the body of water identified as Bayou Caddy empties into the Mississippi Sound. This Court finds that the decision of the Mississippi Gaming Commission was arbitrary and capricious in light of all of the facts available and that the denial of preliminary site approval by the Mississippi Gaming Commission was in excess of the statutory authority granted to the Mississippi Gaming Commission by the Legislature of the State of Mississippi.³⁶

The court reversed the determination of the Gaming Commission and expressly ruled that the Ladner property qualified under Mississippi law and Regulation No. 2 as a potential site for gaming activities.³⁷

Subsequent to the Gaming Commission's Motion to Reconsider and Present Newly Discovered Evidence,³⁸ the court

bayou and a bayou is precluded by law for a suitable site Everyone in that meeting called it a bayou, it was referred to over and over as a bayou. I am familiar with the site. It is a bayou gentlemen. And there was testimony that it was in fact the Sound, a barrier island, should be a part of a barrier island chain. Anyway you look at it my feeling was that it is a bayou for all practical purposes."

9. Aerial photographs depicting Bayou Caddy as emptying into the open water of the Mississippi Sound and showing land mass included marshlands.

Id. at 7-8 (record references omitted); Brief of the Appellants at 16-18, Mississippi Gaming Comm'n v. Ladner (Nov. 7, 1994) (record references omitted) (No. 94-TS-0299).

³⁶ Order at 1-2, Ladner v. Mississippi Gaming Comm'n (Cir. Ct. of Hancock Co., Miss., Apr. 5, 1993) (No. 11,257).

³⁷ *Id.*

³⁸ The Gaming Commission presented evidence that "[t]he coast delegation to the Mississippi Legislature unanimously voted to remove an amendment that

amended its Order on February 7, 1994, to read:

This Court finds that the Ladner site on Bayou Caddy which is the subject of this litigation is qualified for gaming activities under Mississippi law. This Court finds that Mississippi Gaming Commission Regulation No. 2 does not prohibit the location of a gaming facility on the Mississippi Sound. Evidence was uncontradicted that the body of water identified as Bayou Caddy is part of the westward extension of the Mississippi Sound which is bordered on the south side by Point Clear Island. Point Clear Island is one of the islands in the chain of islands that border other portions of the Mississippi Sound, the other islands being Petit Bois Island, Horn Island, Ship Island and Cat Island.

This Court finds that the decision of the Mississippi Gaming Commission was arbitrary and capricious in light of all of the facts available and that the denial of preliminary site approval by the Mississippi Gaming Commission was in excess of the statutory authority granted to the Mississippi Gaming Commission by the Legislature of the State of Mississippi.³⁹

In sum, the Circuit Court of Hancock County initially found, as a matter of statutory construction, that Regulation No. 2 did not prohibit the location of a gaming facility on a river or bayou emptying directly into the Mississippi Sound. However, the court amended its Order, omitting its prior finding and ruling that, as a factual matter, Bayou Caddy was a part of the Mississippi Sound, and thus the Ladner site was qualified for gaming activities under Mississippi law. The court's abandonment in its subsequent Order of the theory that

would have extended sites suitable for gaming to those including the Ladner site." Motion to Reconsider and Present Newly Discovered Evidence at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Apr. 19, 1993) (No. 11,257). This failed amendment purported to allow gaming sites on any "naturally occurring rivers, creeks, bayous or lakes within any county in this state . . . [b]ordering on the Gulf of Mexico that, in their unimproved state, have sufficient depth and width of water for floating a vessel for thirty (30) consecutive days in the year." S.B. 2699, House Am. No. 1, 161st Leg., Reg. Sess. (1993).

³⁹ Order at 2, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Feb. 7, 1994) (No. 11,257).

Regulation No. 2 does not prohibit the location of a gaming facility on a river or bayou emptying directly into the Mississippi Sound casts doubt upon the validity of that argument.

On March 9, 1994, the Mississippi Gaming Commission appealed this Order to the Mississippi Supreme Court, where at the time of drafting of this article it awaits decision.⁴⁰

C. The Pine Hills Site—Are Artificial Improvements to Otherwise Legal Gaming Sites Qualified for Gaming Activities?

The next controversial dockside gaming site before the Mississippi Gaming Commission was a location on the Bay of St. Louis in Harrison County, jointly proposed by Pine Hills Development Partnership, d/b/a Gold Strike Resort & Casino, and Lone Star Pine Hills Corporation.⁴¹ The property which Pine Hills intended to develop for dockside gaming purposes was located off Kiln-Delisle Road on the north shore of the Bay of St. Louis in Section six, Township eight South, Range thirteen West.⁴² Since the property was on the Bay of St. Louis, it constituted a legal site for dockside gaming on the Mississippi Gulf Coast.⁴³

However, for public safety and environmental protection reasons, Pine Hills proposed to develop its site by constructing an artificial inlet and marina system stretching upland from the northern shoreline of the Bay of St. Louis. As proposed, two adjacent Pine Hills casino vessels would float in a marina at the northern end of two inlets approximately 700 feet from the northern shoreline of the Bay of St. Louis. The waters of the

⁴⁰ Brief of the Appellants at 5, *Mississippi Gaming Comm'n v. Ladner* (Miss., Nov. 7, 1994) (No. 94-TS-0299).

⁴¹ [Hereinafter collectively Pine Hills].

⁴² Brief of Appellees at 5, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., July 8, 1994) (No. 94-TS-0235). For a depiction of the geographical features of the subject area, see United States Coast and Geodetic Survey, *Bay St. Louis* (Map), 1:24,000, 7.5 minute series (topographic), N-3015-W8915 (1956, photorevised 1970 & 1976), and United States Coast and Geodetic Survey, *Vidalia* (Map), 1:24,000, 7.5 minute series (topographic), N-3022.5-W8915 (1956, photorevised 1970 & 1976).

⁴³ See Miss. Gaming Comm'n Reg. No. 2 (1990).

Bay of St. Louis would flow through the inlets and marina, and thus the casino vessels would be subject to the ebb and flow of the tide.⁴⁴

The Mississippi Gaming Commission held a site approval hearing for the Pine Hills site on December 16, 1993. A special meeting of the Commission had been previously called on December 3, 1993 to address this issue, but a decision on site approval was delayed upon the last-minute request of the Mississippi Attorney General's office, which wished to issue an Opinion regarding the characteristics of permissible gaming locations along the Mississippi Gulf Coast in advance of any Commission decision on the Pine Hills site.⁴⁵ This Opinion was issued pursuant to the following inquiry posed by Representative Mark W. Garriga and Senator William G. Hewes, III:⁴⁶ "Does the Mississippi Gaming Control Act authorize the construction of casinos along the Mississippi Gulf Coast on inland canals and marinas dredged or created after passage of the Act?"⁴⁷ After several pages of discussion regarding a strict interpretation of the Gaming Control Act and the public policy of the State as expressed by the Legislature, the Garriga Opinion suddenly concluded without supporting citation that:

[O]peration of casinos on the Gulf Coast are legal only in waters of the Mississippi Sound, St. Louis Bay, Biloxi Bay, and Pascagoula Bay.

... [I]t is the opinion of this office that the Mississippi Gaming Control Act and the regulations adopted by the commission do not authorize the operation of casinos along the Mississippi Gulf Coast on inland canals or other artificial watercourses created after passage of the Act.⁴⁸

⁴⁴ Brief of Appellees at 6, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁴⁵ *Id.* at 5.

⁴⁶ Representative Garriga and Senator Hewes represent portions of Harrison County, Mississippi. DICK MOLPUS, *MISSISSIPPI OFFICIAL AND STATISTICAL RECORD*, 1992-1996, 69-70, 98-99 (1993).

⁴⁷ *Legality of Gaming in Waters in Counties Bordering the Mississippi Sound*, Op. Miss. Att'y Gen. at 2 (Dec. 16, 1993) (No. 93-613A), 1993 WL 547516 (Miss. A.G.), *microformed on* Reports and Opinions of the Attorney General (William S. Hein & Co., Inc.) [hereinafter Garriga Opinion].

⁴⁸ *Id.* at 4. Importantly, the Garriga Opinion confirmed that "[w]hile our office

On December 16, 1993, the Commission rejected the Opinion's conclusion and approved the Pine Hills site for dockside gaming.⁴⁹ The Commission's order thus permitted Pine Hills to develop and improve their already legal site by constructing an inlet and marina system extending approximately 700 feet due north from the existing shoreline, in which marina the dockside gaming vessels could be situated.

After having opposed the Pine Hills project throughout the administrative proceedings, the Mississippi Casino Operators Association⁵⁰ subsequently filed a Complaint in the Circuit Court of Hinds County, Mississippi on December 17, 1993, against the applicants and the Mississippi Gaming Commission, requesting an order reversing the Commission's decision, a declaratory judgment regarding permissible dockside gaming sites, and injunctive relief.⁵¹ The Association claimed that although the shoreline of the Bay of St. Louis was a permissible site for dockside gaming on the Mississippi Gulf Coast, an artificial inlet and marina stretching upland from that shoreline was not.⁵²

can interpret legal standards for initial consideration by the Mississippi Gaming Commission, the commission is responsible for making a factual determination of the precise boundaries of the Mississippi Sound and its three largest bays." *Id.*

⁴⁹ Brief of Appellees at 8, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., July 8, 1994) (No. 94-TS-0235).

⁵⁰ [Hereinafter the Association.] The Association's membership included Biloxi Belle Casino, Casino Magic Corporation, Grand Casinos, Isle of Capri Casino and President Casino, all of which have operated casino gaming establishments on the Mississippi Gulf Coast. Brief of Appellees at i, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235). Casino Magic Corporation operates a casino situated in an artificial mooring basin off the Bay of St. Louis practically identical to the Pine Hills design. *Id.* at 4 n.7. Note that the Biloxi Belle Casino, Casino Magic Corporation, Grand Casinos and the President Casino also individually opposed the Ladner site application, and indeed attempted unsuccessfully to intervene in the Ladner proceedings. See Order, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Feb. 7, 1994) (No. 11,257).

⁵¹ Brief of Appellees at 3-4, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁵² *Id.* at 8; see Complaint, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Cir. Ct. of the 1st Jud. Dist. of Hinds County, Miss., Dec. 17, 1993) (No. 93-77-269). The Association's main concern appeared to be the Pine

On January 10, 1994, the Gaming Commission adopted a Memorandum Opinion⁵³ constituting its final order regarding the Pine Hills site approval. The Commission supported its decision with the following factual and legal grounds:

- (1) The final decision as to whether a dockside gaming site is located on a legal body of water is left to the discretion and reasonable judgment of the Commission;
- (2) Because the Pine Hills site is on the shoreline of the Bay of St. Louis, the proposed site is a legal site for dockside gaming; the actual issue regarding this location is how an otherwise legal site may be designed and developed;
- (3) In any event, design approval is a factual determination left to the discretion and reasonable judgment of the Commission;
- (4) The proposed design of the Pine Hills site involves suitable improvements to the shoreline of the Bay of St. Louis considering the interests of public safety, appropriate commercial development and environmental protection;
- (5) The proposed site is *on* the waters of the Bay of St. Louis in an artificially improved protected cove; this artificial cove is considered a part of the waters of the Bay of St. Louis;
- (6) The Commission's historical delineation of artificial inlets and marinas as part of the waters they adjoin and its prior approval of the similar Casino Magic site in Hancock County, Mississippi is given great weight by the Mississippi Legislature's re-enactment of portions of the Gaming Control Act subsequent to those decisions;
- (7) The establishment of a destination resort as proposed by Pine Hills will enable Mississippi's gaming industry to better compete in the national tourism-convention-gaming market, and is more likely to have a positive economic effect on the

Hills site's proximity to Interstate 10 and the resulting visibility and accessibility therefrom. Brief of Appellant at 24-25, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., June 23, 1994) (No. 94-TS-0235).

⁵³ Mississippi Gaming Commission Memorandum Opinion with Respect to Approval of Gaming Sites Proposed by Gold Strike Resort & Casino and Lone Star Pine Hills Corporation (Jan. 10, 1994) [hereinafter *Memorandum Opinion*]. Note that the Memorandum Opinion "is also intended to furnish general guidance to other present and future applicants with respect to the site evaluation processes utilized by the Commission." *Id.* at 1.

Mississippi Gulf Coast than the establishment of additional casinos that lack substantial ancillary amenities;

(8) The Commission has an affirmative statutory duty to promote competition in the gaming industry⁵⁴ and is not charged to protect existing licensees from additional competition; in any event, existing licensees may realize an increase in patronage from the establishment of the Pine Hills destination resort;

(9) The Official Opinions of the Mississippi Attorney General are advisory in nature and are not binding upon the Commission;⁵⁵ nevertheless, these Opinions support the Commission's approval of the Pine Hills site and confirm that these factual determinations are left to the sole discretion of the Commission; and

(10) Approval of the Pine Hills site does not set precedent for or indicate a Commission intent to approve canals for the purpose of expanding gaming to inshore locations.⁵⁶

The Memorandum Opinion concludes by stating:

The Mississippi Gaming Commission's approval of the site proposed by Gold Strike and Lone Star does not announce any intent to approve sites on proposed gaming sites located on improvements adjacent to the Coastal waters, except (a) within the very narrow parameters described above where the improved site can fairly and reasonably be described as part of the adjoining waters where gaming is permitted and (b) where the modifications of the natural shoreline are necessary to serve the public interest.⁵⁷

The Association argued on appeal⁵⁸ that the Gaming

⁵⁴ See MISS. CODE ANN. § 75-76-3(3)(a) (1991) ("Regulation of licensed gaming is important in order that licensed gaming is conducted honestly and *competitively* . . .") (emphasis added).

⁵⁵ However, the Commission, being "mindful" of Attorney General Opinions and "appreciative of the advice" contained therein, gives the Opinions "great weight in matters relating to legal concerns." Memorandum Opinion, *supra* note 53, at 7.

⁵⁶ Memorandum Opinion, *supra* note 53, at 1-9; Brief of Appellees at 9-10, Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n (Miss., July 8, 1994) (No. 94-TS-0235).

⁵⁷ Memorandum Opinion, *supra* note 53, at 9.

⁵⁸ The parties' arguments did not vary substantially from the Circuit Court

Commission's approval of the Pine Hills site⁵⁹ was: (1) contrary to the language of the Gaming Control Act, Regulation No. 2 and the Official Opinions of the Mississippi Attorney General; (2) in excess of the Commission's statutory authority and jurisdiction; (3) unsupported by the evidence; and (4) arbitrary and capricious and otherwise not in accordance with the law,⁶⁰ because:

- (1) the Pine Hills site was not presently in any "waters," but rather located on land in Harrison County north of the waters of the Bay of St. Louis, making its approval "repugnant to the plain meaning" of section 97-33-1(a) of the Mississippi Code;⁶¹
- (2) the Pine Hills site was not "along the waterfront of the Mississippi Gulf Coast," and thus the Commission's decision approving the site was contrary to the language of the Franckiewicz Opinion;⁶²
- (3) the Garriga Opinion prohibits the operation of casinos along the Mississippi Gulf Coast on inland canals or other artificial watercourses created after passage of the Gaming

proceedings to the Supreme Court proceedings; therefore, citation shall be made exclusively to the briefs filed with the Supreme Court, rather than their Circuit Court counterparts.

⁵⁹ The Association characterized the Pine Hills site as an artificial cove 300 feet long, 800 feet wide, and 10 feet deep, located approximately 1500 feet from the north shore of the Bay of St. Louis and connected thereto by two quarter mile-long channels, one 45 feet wide and another 65 feet wide. Brief of Appellant at 11-12, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., June 23, 1994) (No. 94-TS-0235).

⁶⁰ Complaint at 6-7, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Cir. Ct. of the 1st Jud. Dist. of Hinds County, Miss., Dec. 17, 1993) (No. 93-77-269). Note that MISS. CODE ANN. § 75-76-125(3)(d) (1991) states that the decision must be "[u]nsupported by any evidence" (emphasis added).

⁶¹ Brief of Appellant at 18, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., June 23, 1994) (No. 94-TS-0235) (quoting *Mississippi State Tax Comm'n v. Dyer Inv. Co.*, 507 So. 2d 1287, 1289 (Miss. 1987)). This argument ignores the fact that the Gaming Commission routinely approves casino sites located in artificial inlets and marinas "on the Mississippi River," and that these sites were dry land when approved. Additionally, as discussed *supra*, at p. 368, § 97-33-1(a) of the Mississippi Code is incapable of a "plain meaning." See *supra* notes 12-13 and accompanying text.

⁶² Brief of Appellant at 6-7, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

Control Act; therefore, the Casino Magic site situated in a similar artificial marina in the Bay of St. Louis was distinguishable because of its creation prior to the Act's passage;⁶³

- (4) the Gaming Commission's practice of approving sites in artificial inlets and marinas in counties bordering the Mississippi River was not applicable to the Coast counties, as section 97-33-1(b) of the Mississippi Code "contemplates inland gaming,"⁶⁴
- (5) when approving dockside gaming, voters along the Mississippi Gulf Coast were assured that gaming would be restricted to the coastline as it then existed and would not be permitted to encroach inland therefrom;⁶⁵
- (6) in March, 1993, the Mississippi Legislature considered and rejected an amendment to the Gaming Control Act that would have permitted gaming on the Mississippi Gulf Coast in navigable waters, and in improvements thereto;⁶⁶

⁶³ *Id.* at 26.

⁶⁴ *Id.* at 19. The Association argued that the law authorizing dockside gaming in counties bordering the Mississippi River, MISS. CODE ANN. § 97-33-1(b) (1994), is much broader than its Mississippi Gulf Coast counterpart, as the former clearly contemplates inland gaming on "navigable waters within" said counties. Brief of Appellant at 19 *Mississippi Casino Operators Ass'n* (No. 94-TS-0235). Additionally, MISS. CODE ANN. § 27-109-1(2) (1990) "defines navigable waters to include waters in both their natural and 'improved' condition." However, Pine Hills noted that, notwithstanding the obvious legality of approving artificially improved sites on "navigable waters," the Gaming Commission has approved artificially improved sites deemed "on the Mississippi River" in the absence of express statutory authority. See Brief of Appellees at 35-38, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235). In other words, navigability does not form the legal basis for improvements to the Mississippi River itself. See *infra*, Part III.A.2.

⁶⁵ Brief of Appellant at 5, 20, 27, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁶⁶ *Id.* at 4-5. This amendment purported to allow gaming sites on any "naturally occurring rivers, creeks, bayous or lakes within any county in this state . . . [b]ordering on the Gulf of Mexico that, in their unimproved state, have sufficient depth and width of water for floating a vessel for thirty (30) consecutive days in the year." S.B. 2699, 161st Leg., Reg. Sess. (1993). Additionally, the amendment permitted gaming on improvements to navigable waters, including "marinas, slips or man-made harbors." *Id.*

However, Pine Hills noted that the 1994 Legislature refused to adopt two bills that would have specifically *prohibited* dockside gaming in man-made water

- (7) the Commission's decision approving the Pine Hills site established precedent for further inland expansion of gaming into the coastal counties;⁶⁷ and
- (8) the Commission's decision approving the Pine Hills site was unfair to other casino operators who had invested significant capital in their sites in reliance upon a belief "that the Commission would follow the law in considering future site applications."⁶⁸

In response, Pine Hills argued that the Commission's approval of the Pine Hills site was supported by ample evidence, was not in excess of its statutory authority or jurisdiction, and was not arbitrary or capricious or otherwise in accordance with the law, because:

- (1) the Official Opinions of the Attorney General defer a decision on such issues to the discretion of the Commission;⁶⁹
- (2) the Commission has exercised its discretion in the past to approve artificial inlets and marinas as gaming sites, including one site virtually identical to the site in issue;⁷⁰

bottoms. Brief of Appellees at 30 n.35, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Miss., July 8, 1994) (No. 94-TS-0235). See S.B. 2846, 162nd Leg., Reg. Sess. (1994) (prohibiting gaming sites on "man-made water bottoms, or rivers, creeks, bayous or other naturally occurring bodies of water other than the Back Bay of Biloxi, St. Louis Bay or the Mississippi Sound. . ."); S.B. 3043, 162nd Leg., Reg. Sess. (1994) (prohibiting gaming sites on "man-made water bottoms or rivers, creeks, bayous or other naturally occurring bodies of water other than the Back Bay of Biloxi east of Interstate 110, St. Louis Bay or the Mississippi Sound").

Importantly, the Circuit Court of Harrison County, Mississippi has specifically held that the Legislature's failure to adopt S.B. 3043 clearly implied that its intent was "not to limit or restrict bayous as legal gaming sites." Findings of Fact and Conclusions of Law at 5, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Dec. 30, 1994) (No. A-2401-94-00211).

⁶⁷ Brief of Appellant at 21-24, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁶⁸ *Id.* at 6.

⁶⁹ See Brief of Appellees at 24-26, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235) (citing Franckiewicz Opinion and Garriga Opinion).

⁷⁰ *Id.* at 26. The Mississippi Gaming Commission had already approved the sites of several gaming facilities on the Mississippi Gulf Coast, as well as on the Mississippi River, that were situated in artificially created inlets or marinas. *Id.* at 26, 35. Indeed, one such artificial inlet and marina off the Bay of St. Louis, virtually identical to the location presently in issue was approved on April 29,

- (3) the Legislature's re-enactment of certain sections of the Gaming Control Act bestowed the force of law upon the Commission's interpretation allowing approval of artificially created inlets and marinas as permissible gaming sites on the Coast;⁷¹
- (4) under Mississippi law, artificial inlets and marinas constructed both before and after the passage of the Gaming Control Act are legal gaming sites;⁷²

1992 as the site for Casino Magic after the issuance of the Franckiewicz Opinion and the subsequent promulgation of Regulation No. 2. *Id.* at 29. The Commission, by its licensing of Casino Magic, has interpreted "waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi" to include improvements to such waters and thus, has set as precedent the practice of approving artificially created inlets and marinas as permissible gaming sites on the Mississippi Gulf Coast. *Id.* at 26. The Commission distinguished theoretical attempts to connect an otherwise illegal site to legal waters by artificial means, which would not qualify the site for gaming. *Id.* at 23-24.

⁷¹ *Id.* at 27. Because the Mississippi Legislature brought forward the phrase "waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi" in amended versions of MISS. CODE ANN. §§ 67-1-71(i) (Supp. 1994) and 97-33-7(4)(a) (1994), with knowledge of, and without any indication that, its prior interpretation should no longer be credited, the interpretation placed upon that ambiguous phrase by the Gaming Commission at the time of the re-enactment effectively became a part of that phrase, and thus carries the force of law. See *Sheldon v. Mississippi Cottonseed Prod. Co.*, 81 F.2d 169, 171-72 (5th Cir.) (stating that re-enactment of statute with executive construction amounts to adoption of construction), *cert. denied*, 297 U.S. 721 (1936); *McDaniel v. Beane*, 515 So. 2d 949, 951 (Miss. 1987) (stating that statutory language brought forward in amended version is given same interpretation absent indications to contrary); *Crosby v. Alton Ochsner Medical Found.*, 276 So. 2d 661, 670 (Miss. 1973) (holding that statutory interpretation becomes part of statute when statute is repeatedly re-enacted without substantial change); *Barr v. Delta & Pine Land Co.*, 199 So. 2d 269, 271 (Miss. 1967) (stating Legislature presumed to know and adopt administrative construction when re-enacting statute). At the time these amended statutes became effective (July 1, 1992), the Commission interpreted that phrase to include artificial inlets and marinas. See Brief of Appellees at 27-29, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁷² Brief of Appellees at 30-35, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235); see also *Tri-State Transit Co. v. Stone*, 16 So. 2d 782, 784 (Miss. 1944) (holding statutes phrased in general and comprehensive terms include both presently existing and prospective meanings of those terms, absent express contrary reservation) (citing *Hester v. Copiah County*, 191 So. 496 (Miss. 1939)); 2 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION 956 (2d ed. 1904)). This authority was

- (5) public safety is served by the use of artificially created inlets and marinas connected to waters which are themselves legal locations for dockside gaming;⁷³ and
- (6) the Pine Hills site was designed so as to offer the least amount of environmental damage, and indeed enhances the Bay of St. Louis' ecosystem.⁷⁴

used to discredit the Garriga Opinion's conclusion and the Association's argument, both of which were unsupported by any cited authority, that there is a legal distinction between artificial inlets and marinas existing before the passage of the Gaming Control Act and those constructed after. Brief of Appellees at 30-35, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁷³ Brief of Appellees at 35-38, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235). The Mississippi Gaming Commission has recognized this need for public safety when reviewing dockside gaming sites along the Mississippi River. See Memorandum Opinion, *supra* note 53, at 7. Although such gaming may only occur "on the Mississippi River or navigable waters within any county bordering on the Mississippi River," MISS. CODE ANN. § 97-33-1(b) (1994), the Commission has characterized improved and extended bodies of water emanating from the banks of the Mississippi River as being "on the Mississippi River" itself, and thus are legal dockside gaming sites. Brief of Appellees at 36-37, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235). These public safety considerations are expressed and cited as the authority for the Attorney General's Opinion by Carole Edds to Chuck O. Patton [hereinafter Patton Opinion] as follows:

As a practical matter extensive site development is necessary along the Mississippi River due to wide fluctuations in river stages that could result in vessel instability and lack of ingress and egress in emergency situations. Consequently the issue we must address is the extent an otherwise legal site may be improved to more safely accommodate a gaming vessel. It is the opinion of this office that the Mississippi River and navigable waters may be improved and extended to accommodate development, provided such expansion can be characterized as part of such waters.

Gaming—Navigable Waters, Op. Miss. Att'y Gen., at 6-7 (July 14, 1993), in possession of Mississippi Attorney General.

This Opinion formed the basis for the Commission's interpretation and decisions allowing development of virtually every site "on the Mississippi River" by digging an artificial inlet and marina for the location of the gaming vessels. Although the Patton Opinion was issued in response to an inquiry regarding sites along the Mississippi River and not the Mississippi Gulf Coast, such public safety considerations as expressed by the Attorney General and observed by the Mississippi Gaming Commission are certainly at least as applicable to gaming sites on the Mississippi Gulf Coast as well because of the increased severity and frequency of emergency situations due to inclement weather on the Coast. See Brief of Appellees at 37-38, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

⁷⁴ *Id.* at 38-40.

Furthermore, Pine Hills argued that, contrary to the fears of the Association, the approval of its site does not establish precedent for the unhindered construction of canals northward from the Mississippi Gulf Coast, nor does it promote unfair competition.⁷⁵

The Circuit Court of Hinds County, the Honorable L. Breland Hilburn presiding, subsequently affirmed the Commission's decision, finding that:

[I]t is obvious that under the Mississippi Gaming Act, the Commission is necessarily vested with the authority to determine the location of casinos which wish to build in the Gulf Coast area. This authority should only be disturbed by a reviewing Court upon a showing of a clear abuse by the Commission.⁷⁶

The circuit court held that the Commission's order was not "arbitrary or capricious or beyond the statutory authority granted to the Commission by the [L]egislature."⁷⁷

The Association subsequently filed its Notice of Appeal on March 3, 1994, contending that the circuit court erred in affirming the Commission's decision to approve the Pine Hills site. That decision of the circuit court is presently on review before the Mississippi Supreme Court.⁷⁸

⁷⁵ *Id.* at 40-48.

⁷⁶ Order at 2-3, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Cir. Ct. of the 1st Jud. Dist. of Hinds County, Miss., Feb. 3, 1994) (No. 93-77-269).

⁷⁷ Order at 3, *Mississippi Casino Operators Ass'n* (No. 93-77-269) The Circuit Court also found that the use of the term "port" in MISS. CODE ANN. § 97-33-1 (1994) was helpful in determining legislative intent and supported the Commission's decision. Order at 2, *Mississippi Casino Operators Ass'n* (No. 93-77-269).

⁷⁸ Brief of Appellees at 5, *Mississippi Casino Operators Ass'n* (No. 94-TS-0235).

D. The Royal Casino Site—Does Bayou Bernard Qualify as a Legal Gaming Site Under Regulation No. 2?

The most recent siting controversy to befall the Mississippi Gaming Commission was prompted by the site application of Royal Casino Corporation.⁷⁹ Royal applied for a gaming license for a site consisting of approximately 125 acres in the North-east quarter of Section sixteen, Township seven South, Range eleven West in Harrison County, Mississippi. This site was on the north shore of Bayou Bernard in the northeast quadrant of the intersection of Interstate 10 and Highway 49.⁸⁰ The proposed commercial development on this site was to consist primarily of two dockside casinos and a large shopping mall anchored by four major department stores. Being located on sixteenth section land, the proposed development was supported by the Harrison County Board of Education, which stood to gain greatly from the lease of the property.⁸¹

On April 21, 1994, a site assessment hearing was held before the Gaming Commission to determine whether the Royal site was suitable for a gaming facility. Both proponents and opponents⁸² of the project presented testimony regarding whether Bayou Bernard was merely a bayou and thus not a legal gaming site under Regulation No. 2, or was actually a part of the Back Bay of Biloxi and thus legal. Due to the absence of its Executive Director, the Commission deferred consideration of the Royal site, and, at its next meeting on May 31, 1994, decided in a divided vote that the location did not

⁷⁹ As proposed, Royal Casino Corporation would operate one casino and Forest City/Ratner and Forest City Development would operate another casino on the site [hereinafter collectively Royal]. Brief of Appellants at 3, Board of Educ. v. Mississippi Gaming Comm'n (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994) (No. A-2401-94-00211).

⁸⁰ For a depiction of the geographical features of the subject area, see United States Coast and Geodetic Survey, *Gulfport North* (Map), 1:24,000, 7.5 minute series (topographic), 30089-D1-TF-024 (1954, photorevised 1985).

⁸¹ Brief of Appellants at 2-3, *Board of Educ.* (No. A-2401-94-00211).

⁸² Once again, a proposed gaming site's proximity to Interstate 10 prompted at least one existing casino operator on the Mississippi Gulf Coast to openly oppose that site.

qualify under the provisions of the Mississippi Gaming Control Act or Regulation No. 2. On June 9, 1994, Royal and the Harrison County Board of Education appealed the Commission's decision to the Circuit Court of Harrison County, claiming that the Commission's denial of the site was arbitrary and capricious, not in accordance with law, and in violation of constitutional provisions.⁸³

On appeal, Royal argued (1) that its site qualified for gaming under Regulation No. 2, and (2) in the alternative, should the court find that Royal's site did not qualify, that Regulation No. 2 was void since it conflicted with the statute which described where legal gaming may be conducted on the Mississippi Gulf Coast.⁸⁴ First, after establishing that the determination of the precise boundaries of the Mississippi Sound, its bays and tributaries was a factual matter left to the Mississippi Gaming Commission, Royal characterized the key issue as whether the site was within the "precise boundaries" of the Back Bay of Biloxi.⁸⁵ Royal claimed that the boundary of the Back Bay of Biloxi extended to the ordinary high-water mark where the tide ebbs and flows, including the portion of Bayou Bernard in question, and presented legal authority⁸⁶ and fac-

⁸³ Brief of Appellants at 3-4, *Board of Educ.* (No. A-2401-94-00211); Brief of the Appellees at 2-3 *Board of Ed.* (No. A-2401-94-00211).

⁸⁴ Brief of Appellants at 4-5, *Board of Educ.* (No. A-2401-94-00211); MISS. CODE ANN. § 97-33-1 (1994).

⁸⁵ Brief of Appellants at 4-5, *Board of Educ.* (No. A-2401-94-00211) (citing Franckiewicz Opinion, *supra* note 16 and Garriga Opinion, *supra* note 47).

⁸⁶ *Id.* at 7-12; see *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 23 (1935) ("When . . . the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended," high-water mark being defined as "the line of high water as determined by the course of the tides") (quoting *United States v. Pacheco*, 2 Wall. 587, 590 (1865)); *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 516 (Miss. 1986) (finding that Bayou Bernard is "an admitted commercially navigable portion of Biloxi Back Bay") (citing *State ex rel. Rice v. Stewart*, 184 So. 44, 45 (Miss. 1938); *Stewart*, 184 So. at 45) (Bayou Bernard is subject to ebb and flow of tide). See Brief of Appellants at 7-10, *Board of Educ.* (No. A-2401-94-00211); see also *Crary v. State Highway Comm'n*, 68 So. 2d 468, 470 (Miss. 1953) (citing *Stewart*, 184 So. at 45) (finding that Bayou Bernard is "an inlet of the Mississippi Sound").

However, with the exception of *Pacheco*, which involved a Mexican land grant, the issue adjudicated in the above-cited cases was whether tidal beds were

tual evidence⁸⁷ in support of this contention.

In the alternative, should the court find that the Royal site did not qualify under Regulation No. 2, Royal contended that Regulation No. 2, and the Franckiewicz Opinion upon which Regulation No. 2 is based, conflict with section 97-33-1(a) of the Mississippi Code, and thus were of no legally binding effect.⁸⁸ Royal argued that because this section was inherently contradictory, its application required some interpretation. However, the Mississippi Supreme Court has already spoken on the issue of whether Bayou Bernard is a part of the Back Bay of Biloxi.⁸⁹ Therefore, an Opinion of the Attorney General which is merely advisory cannot contradict that ruling.⁹⁰ Furthermore, regulations of the Mississippi Gaming Commission must be consistent with state law. The Mississippi Supreme Court has long held that substantive law is not to be thwarted by administrative rules adopted for implementation of legislative intent, nor is an administrative regulation to contravene or nullify controlling statutory enactments or be more restrictive

held in trust by a state as a result of a grant from the United States upon entering statehood. Indeed, nowhere did the *Stewart* court hold that Bayou Bernard was a "part" of the Back Bay of Biloxi or the Mississippi Sound. The court merely held that because Bayou Bernard was subject to the ebb and flow of the tides, the State of Mississippi was the absolute owner of the title of the soil of its bed, subject only to the right of the United States to control commerce and navigation, just as in and through the Back Bay of Biloxi. *Stewart*, 185 So. at 46.

⁸⁷ Royal presented the following factual evidence:

1. The expert testimony of George M. Cole and Dr. Ervin G. Otvos established that the proposed site is below the mean high water mark and is clearly within the tide water of the Mississippi Sound;
2. The testimony of the opposition's expert, Admiral Wesley V. Hull, did not contradict that of Cole and Otvos, and indeed did not dispute that the proper test for determining the boundary of the Bay was "the ebb and flow test," or that the waters at the proposed site were influenced by the ebb and flow of the tide; and
3. The Legislature's actions and inactions in the 1994 Regular Session indicate an intent *not* to limit or restrict bayous, rivers and creeks from being granted site approval. *See supra* note 66.

Brief of Appellants at 10-12, *Board of Educ.* (No. A-2401-94-00211).

⁸⁸ MISS. CODE ANN. § 97-33-1(a) (1994).

⁸⁹ *State ex rel. Rice v. Stewart*, 184 So. 44 (Miss. 1938).

⁹⁰ *See* Brief of Appellants at 12-14, *Board of Educ.* (No. A-2401-94-00211); *supra* note 20.

that the statute itself.⁹¹ Regulation No. 2 is not in accord with the *Stewart* decision and the clear intent of the Legislature, and thus is of no effect.⁹²

The Mississippi Gaming Commission countered, noting the Legislature's delegation of very broad authority and responsibility to the Commission to regulate the gaming industry with all powers, duties and responsibilities provided under the Gaming Control Act⁹³ and the subsequent promulgation of Regulation No. 2 providing a definition of "the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi."⁹⁴ After arguing the validity of Regulation No. 2, the Commission presented evidence that the proposed site was on a bayou, not the Back Bay of Biloxi, and therefore not suitable for gaming.⁹⁵

⁹¹ *Buse v. Mississippi Employment Sec. Comm'n*, 377 So. 2d 600, 602 (Miss. 1979); *Mississippi State Tax Comm'n v. Reynolds*, 351 So. 2d 326, 327 (Miss. 1977); *Crosby v. Barr*, 198 So. 2d 571, 573 (Miss. 1967).

⁹² Brief of Appellants at 14-15, *Board of Educ.* (No. A-2401-94-00211).

⁹³ See MISS. CODE ANN. § 75-76-33(1) (1991) ("The commission shall, from time to time, adopt, amend or repeal such regulations, consistent with the policy, objects and purposes of this chapter, as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this chapter."); see *supra* note 5.

⁹⁴ Brief of the Appellees at 17-21, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994) (No. A-2401-94-00211).

⁹⁵ The evidence consisted of the expert testimony of Conrad A. Gazzier and Philip E. LaMoreaux, Sr. See Brief of the Appellees at 21-22, *Board of Educ.* (No. A-2401-94-00211). Additionally, the Commission noted that:

The General Land Office Survey performed at or near the time of Statehood designates the waterway (Bernard Bayou) as a Bayou. This is important to note that the definition of the waterway has not changed from what it was classified at the time of statehood. In review of the surveys, charts, maps, publication[], and documents of the area, the waterway that leads from Big Lake to northwest of the intersection of U.S. Highway 49 and Intersection [sic] 10 is clearly marked as a bayou. It is recognized on the products and publications of the federal and state agencies as Bernard Bayou. The standard accepted definition of bayou describes the waterway as it previously and presently exists. The site requested by Royal Casino[] is on a Bayou, it is not on the Back Bay of Biloxi, Biloxi Bay or the Mississippi Sound.

Id. at 27.

The Gaming Commission also argued that the intent of the Mississippi Legislature when it passed the Gaming Control Act was to not site casinos on bayous on the Mississippi Gulf Coast, thus making Regulation No. 2 in accord with legislative intent.⁹⁶ Additionally, the Commission argued that the Legislature's re-enactment of certain portions of the Gaming Control Act gave the force of law to Regulation No. 2⁹⁷ and recognized the authority of the Commission to promulgate and interpret the regulation.⁹⁸

Finally, the Gaming Commission rejected the "ebb and flow test" as a tool for determining the legal extent of dockside gaming on the Mississippi Gulf Coast. The Commission asserted that the issue before the court in *Stewart* and *Cinque Bambini* was whether the title of certain tidelands was held in trust by the state, not whether a proposed gaming site was suitable under the Gaming Control Act and the regulations of the Mississippi Gaming Commission.⁹⁹

On November 21, 1994, the Circuit Court of Harrison County, Mississippi, the Honorable James E. Thomas presiding, conducted a hearing, and on December 30, 1994, the court rendered a decision in favor of Royal, overturning the decision of the Gaming Commission and declaring the site to be a "lawful and legal site for a casino or casinos in the State of Mississippi."¹⁰⁰ Specifically, the court found as follows:

- (1) Expert testimony established that the proposed Royal site was below the mean high water mark and was clearly

⁹⁶ H.B. 2, 1990 Extraordinary Session, as introduced into and passed by the House of Representatives, defined "navigable waters" as "any rivers, creeks, bayous or other bodies of water within any county in this state bordering on the Mississippi River or the Gulf of Mexico . . . ;" however, the bill as sent to and signed by the Governor did not include the phrase "or the Gulf of Mexico" in the definition of "navigable waters." See Brief of the Appellees at 22-23, *Board of Educ.* (No. A-2401-94-00211).

⁹⁷ See *supra* note 63.

⁹⁸ Brief of the Appellees at 24-25, *Board of Educ.* (No. A-2401-94-00211).

⁹⁹ *Id.* at 27-29.

¹⁰⁰ Findings of Fact and Conclusions of Law at 20, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison Co., Miss., Dec. 30, 1994) (No. A-2401-94-00211).

within the tide water of the Mississippi Sound and was, therefore, a part of Biloxi Bay;¹⁰¹

- (2) The 1994 Legislature's failure to adopt Senate Bill 3043¹⁰² established that the intent of the Legislature was not to limit or restrict bayous as legal gaming sites and that the bayous in the three coastal counties were legal gaming sites, so long as the bayous were legally within the Biloxi Back Bay and the Commission factually determined that the site was acceptable;¹⁰³
- (3) The lack of a requirement in section 97-33-1(a) of the Mississippi Code that legal gaming sites in the three coastal counties be located on "navigable waters," which is a statutory requirement for a legal gaming site within any county bordering on the Mississippi River,¹⁰⁴ indicated an intent that in the three coastal counties a legal gaming site may be located on non-navigable waters, provided the remaining statutory requirements are met;¹⁰⁵
- (4) The exclusion of bayous as legal gaming sites, as articulated by the Franckiewicz Opinion and Regulation No. 2, was not authorized by statute, was beyond the authority of the Commission to make, was arbitrary and capricious, and was, therefore, void and illegal;¹⁰⁶
- (5) The Gaming Commission's reliance upon section 75-76-33(2)(j) of the Mississippi Code for authority that the Legislature granted the Commission the authority to issue regulations which limit the legal locations for dockside

¹⁰¹ *Id.* at 3-5.

¹⁰² *See supra* note 66.

¹⁰³ Findings of Fact and Conclusions of Law at 5, 9, *Board of Educ.* (No. A-2401-94-00211).

¹⁰⁴ MISS. CODE ANN. § 97-33-1(b) (1994). This statement is not entirely correct, as a gaming site within a county bordering on the Mississippi River may also be legally located "on the Mississippi River" without regard to navigability. *Id.*

¹⁰⁵ *See City of Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992) (stating that "the omission of language from a similar provision on a similar subject indicates that the legislature had a different intent in enacting the provisions, which it manifested by the omission of the language"); Findings of Fact and Conclusions of Law at 8, *Board of Educ.* (No. A-2401-94-00211).

¹⁰⁶ Findings of Fact and Conclusions of Law at 8-9, 11, *Board of Educ.* (No. A-2401-94-00211).

gaming was misguided, as that statute gave the Commission the authority to "limit the area, games and devices permitted, and the method of operation of such games and devices" *on a gaming vessel* and had nothing to do with whether a particular location was a legal gaming site;¹⁰⁷

- (6) Because the Commission lacks the express statutory authority to adopt regulations regarding the location of legal gaming sites, the only rules or regulations that the Commission may promulgate regarding that matter are purely interpretive rules, which are not intended to have any legal effect, do not have the force and effect of law, and are not binding on a court;¹⁰⁸ and
- (7) The Royal site, located on Bayou Bernard, was a legal gaming site, as Biloxi Bay consists of all areas within the ebb and flow of the tide, including, specifically, Bayou Bernard and the Royal site.¹⁰⁹

The court concluded that:

[I]t is the opinion and judgment of this Court that the decision of the Mississippi Gaming Commission in finding that the Royal Casino site is not a legal gaming site, was violative of the applicable statutes[,] in excess of the statutory authorities; unsupported by any credible evidence; arbitrary and capricious; not in accordance with applicable law; and, not supported by substantial evidence. The decision is, therefore, reversed. The Royal Casino site is hereby declared to be a lawful and legal site for a casino or casinos in the State of Mississippi.¹¹⁰

This decision effectively opens up all areas affected by the ebb and flow of the tide to legal dockside gaming. However, the court noted that "[t]his decision in no way prohibits the Mississippi Gaming Commission from prohibiting gaming in areas of Harrison County legally permissible but which the Commission in its discretion on a factual basis determines to be unsuit-

¹⁰⁷ *Id.* at 9-10.

¹⁰⁸ *Id.* at 10 (citing 2 AM. JUR. 2D *Administrative Law* §§ 160-61 (1994)).

¹⁰⁹ *Id.* at 12-16.

¹¹⁰ *Id.* at 20.

able."¹¹¹

The Gaming Commission has appealed this decision to the Mississippi Supreme Court.

IV. DOCKSIDE GAMING IN THE RIVER COUNTIES

The Gaming Control Act legalized dockside gaming on vessels either on the Mississippi River or on the "navigable waters" within any county bordering the River.¹¹² In this context the Mississippi River extends beyond its traditional banks and includes those oxbow lakes and improvements which are part of the River. Part IV.A of this article outlines the criteria by which oxbow lakes and improvements to the River are deemed part of the River, as interpreted by the Mississippi Attorney General in two official Attorney General Opinions.¹¹³ This part further examines the Commission's siting decisions in light of these interpretations. Finally, this part outlines the Commission's policy against siting gaming operations on the west bank of the Mississippi River.

Regarding dockside gaming on "navigable waters," Part IV.B of this article outlines section 27-109-1(2)'s multi-part definition of "navigable waters" and its construction by the Williams and Patton Opinions. At the heart of a definition of navigable waters is its navigable-in-fact test, a standard of navigability often expressed in terms of the watercourse's navigable capacity. Differing standards of navigability have developed to justify admiralty jurisdiction, Congress' powers under the Interstate Commerce Clause, and the imposition of naviga-

¹¹¹ *Id.*

¹¹² "On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79. . . ." MISS. CODE ANN. §§ 97-33-1(b), -7(4)(b), -17-1(b), 25(b) and -27(b) (1994).

¹¹³ Definition of "navigable waters," Op. Miss. Att'y Gen. (May 18, 1993) (No. 92-285) *microformed on* Reports and Opinions of the Attorney General (William S. Hein & Co., Inc.), 1992 WL 613929 (Miss. A.G.) [hereinafter Williams Opinion]; Patton Opinion, *supra* note 73.

ble servitudes. The Williams and Patton Opinions relied on the admiralty jurisdiction precedent to construe section 27-109-1(2)'s navigable-in-fact test and this part illustrates the admiralty standard conflicts and that section's other navigable waters criteria, particularly the allowances for improvements and interruptions. This part concludes that the Commerce Clause standard of navigability stands more in harmony with this definition and examines the Commission's approval of a site on the Big Black River under both the admiralty jurisdiction and Commerce Clause standards.

A. *On the Mississippi River*

Of the twenty-four licensed gaming operations in the Mississippi River Counties, only two vessels actually float upon the Mississippi River.¹¹⁴ Lady Luck Casino in Natchez and the Rainbow Theme Park and Casino in Vicksburg are actually moored on the river.¹¹⁵ They share a geographical common denominator—all are located on that portion of the River adjacent to the Bluff Hills.¹¹⁶ Here the Mississippi River's rise and fall measures more vertically than horizontally.

In the Delta counties of Coahoma, Washington, and Tunica, the dockside gaming vessels are located either on man-made waters linked by natural or dredged channels to the Mississippi River or on oxbow lakes of the River. The "Delta" commonly refers to the Yazoo Basin, that alluvial plain of the Mississippi River and its tributaries located between Memphis, Tennessee and Vicksburg, Mississippi.¹¹⁷ For eons the Mississippi River's

¹¹⁴ Miss. Gaming Comm'n, Gaming Statistics (Dec. 31, 1994).

¹¹⁵ The Isle Of Capri and Ameristar Casino in Vicksburg are moored in cofferdams constructed into the banks of the Mississippi River. Harrah's is actually moored in cofferdams constructed in the Yazoo Diversion Canal, which is either an improvement to the Yazoo River, a navigable water to Lake Centennial, an oxbow lake of the Mississippi River or part of the Mississippi River itself. "The diversion canal constructed in 1903 by the Army Corps of Engineers diverted the Yazoo River into the Mississippi's old bed in front of Vicksburg and restored the town's waterfront." MARION BRAGG, HISTORIC NAMES AND PLACES ON THE LOWER MISSISSIPPI RIVER 163 (1990).

¹¹⁶ RAND McNALLY, NEW CENTURY WORLD ATLAS 81 (1986).

¹¹⁷ *Id.*

seasonal rise and fall has nourished and shaped the flat, rich farmland of the Delta. Here the seasonal rise and fall causes the River to widen and narrow significantly. According to the Patton Opinion, "[a]s a practical matter extensive site development is necessary along the Mississippi River due to wide fluctuations in river stages that could result in vessel instability and lack of ingress and egress in emergency situations."¹¹⁸ Therefore, vessels must be sited off the River, in either oxbow lakes or improvements to the River.

1. Oxbow Lakes as Part of the Mississippi River

By flood or other avulsion,¹¹⁹ the Mississippi River has transformed many of its old river bends into oxbow lakes.¹²⁰ Thus, oxbow lakes were once part of the River.¹²¹ Unless cut off by a levee or dam, they typically connect to the River through a channel and are "characterized by currents which reverse seasonally, running one direction when the Mississippi River rises, and in the opposite direction when the river falls."¹²² Based upon continuous or seasonal communication with the River, the Williams Opinion distinguished oxbow lakes from landlocked, currentless bodies of water and concluded that oxbow lakes are "navigable waters" under the Act.¹²³

¹¹⁸ Patton Opinion, *supra* note 73, at 6.

¹¹⁹ Mississippi jurisprudence defines an avulsion as "a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress." *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 520 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

¹²⁰ *Dycus v. Sillers*, 557 So. 2d 486, 500 n.67 (Miss. 1990).

¹²¹ *Id.* at 501.

¹²² Williams Opinion, *supra* note 113, at 3.

¹²³ Representative Kenneth Williams of Clarksdale, Mississippi requested an opinion "as to what water qualifies as 'navigable water' for the purpose of locating vessels to be used for gaming under the Mississippi Gaming Control Act." Williams Opinion, *supra* note 113, at 1. The opinion also specifically requested:

(1) Where a lake has no connection with the Mississippi River will something less than annual flooding of the lake by high waters of the Mississippi River qualify the lake as "navigable waters"?; and (2) Can the nexus between the lake and Mississippi River be supplied by an existing artificial drainage ditch or one which might be constructed for this pur-

This opinion also cited *Dycus v. Sillers*¹²⁴ for a significant exception to this seasonal communication requirement:

Artificially created impediments to passage do not deprive an otherwise conforming body of water of its "navigable" status. If the body of water met the test of "navigability" prior to the construction of the levee, dam or other obstruction, then that body continues to be "navigable" under the terms of the Gaming Control Act.¹²⁵

Thus, according to the Williams Opinion, oxbow lakes which seasonally communicate with the Mississippi River, or would seasonally communicate absent an artificially created impediment, are "navigable waters."

The Patton Opinion, containing the Attorney General's more recent statement regarding oxbow lakes, agreed that oxbow lakes are suitable waters for dockside gaming; however, it followed a different course of reasoning.¹²⁶ Also citing *Dycus*, the Patton Opinion reasoned that "[o]nce part of the Mississippi River as it existed on or after 1817, such lakes remain part of the Mississippi River as long as such lakes are subject to the rise and fall of the waters of the Mississippi River."¹²⁷ Thus, it excepted oxbow lakes from the "navigable waters" analysis because they are part of the Mississippi River.¹²⁸

Within the contours of these opinions, the Commission has licensed several gaming operations on these oxbow lakes, including the Cotton Club and Las Vegas Casinos on Lake Ferguson,¹²⁹ adjacent to Greenville in Washington County,

pose?

Id.

¹²⁴ 557 So. 2d 486 (Miss. 1990).

¹²⁵ Williams Opinion, *supra* note 113, at 4 (citing *Dycus*, 557 So. 2d at 503).

¹²⁶ Patton Opinion, *supra* note 73, at 6.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ "The Army Corps of Engineers restored Greenville's status as a river town when it completed the Greenville Harbor Project in April, 1963. The oxbow lake [formed by the Tarpley Cutoff], renamed Lake Ferguson, serves as a slack-water port. . . ." BRAGG, *supra* note 115, at 131-32.

and proposed casinos on Old River Lake and Buck Lake, in Tunica County. Unlike Lake Ferguson, which continuously communicates with the River, Old River Lake and Buck Lake only seasonally communicate with the Mississippi River through natural channels.¹³⁰ These channels are not navigable except when the Mississippi River rises toward its high water stage. All of these oxbow lakes lie on the west and on the unprotected side of the Yazoo-Mississippi River Levee.

If, as the Williams Opinion states, artificially created impediments do not alter the character of the oxbow lake, then Lake Washington, which is located south of Greenville, and Eagle Lake, which is located north of Vicksburg, both of which lie east of or on the protected side of the Yazoo-Mississippi River Levee, would qualify as legal gaming waters.¹³¹ Does this apparent exception to the seasonal communication requirement survive the Patton Opinion? The Patton Opinion does not expressly address the legal effects of artificially created impediments to communication between the oxbow lake and the River. An analysis by implication leads to differing conclusions. Like the Williams Opinion, the Patton Opinion relied upon *Dycus* for its conclusion that an oxbow lake which seasonally communicates with the Mississippi River is still part of the River.¹³² *Dycus* is a public servitude case and states the principle that artificially created impediments do not destroy a water's public character.¹³³ The Patton Opinion's silence on

¹³⁰ Old River Lake communicates most of the year through its channel connected to the River; however, Buck Lake's channel is silted in and only communicates when the River reaches its highest stages.

¹³¹ Both Lake Washington and Eagle Lake have been declared "non-navigable" for the purposes of U.S. Army Corps of Engineers jurisdiction under § 10 of the Rivers And Harbors Appropriations Act of 1899. 33 U.S.C. §§ 403, 47 (Eagle Lake), 59g (Lake Washington) (1988).

¹³² Patton Opinion, *supra* note 113, at 6.

¹³³ *Dycus*, 557 So. 2d at 500-01. In *Dycus* the dispute focused on whether the Beulah Crevasse, more properly known as the Merigold Blue Hole, was subject to the public navigational servitude. *Id.* Sovereign rights are preserved in public servitude cases by finding that artificial impediments to navigability do not alter the public rights. *Id.* Thus, the construction of the Yazoo-Mississippi River Levee does not alter the public character of oxbow lakes such as Lake Washington or Eagle Lake. *Id.*

this issue could be construed as acceptance of this exception to seasonal communication. However, the Patton Opinion urges a narrow construction of the Act so as "to limit a pervasion of gaming" - a policy inconsistent with such a potentially broad exception to the seasonal communication requirement.¹³⁴ Defining oxbow lakes based on contemporary communication with the Mississippi River limits those oxbow lakes suitable for gaming to those on the unprotected west side of the Yazoo-Mississippi River Levee. Regardless, the Commission has not shown any inclination to approve sites on the protected east side of the Levee.

2. *Improvements as Part of the Mississippi River*

Like the Act itself, the Williams Opinion did not expressly address the issue of improvements to the Mississippi River.¹³⁵ But, based on its reasoning that the phrase "other bodies of water" included natural watercourses, the Williams Opinion concluded that "artificially created lakes, ponds, borrow pits or other bodies of water are not "navigable waters," and that "artificially created channels connecting otherwise non-navigable bodies of water to a navigable watercourse do not change the fundamental character of the non-navigable body to a navigable one."¹³⁶

Shortly after the Attorney General issued the Williams Opinion, the Commission found the proposed site of Splash Casino suitable under the Act. Splash Casino is located at Mhoon Landing in Tunica County where the dockside gaming vessel floats in a mooring basin dredged into the banks of the Mississippi River.¹³⁷ Under the Williams Opinion, the Splash site would not qualify as "navigable waters." Apparently, this site was legal as an improvement to the Mississippi River.

Roughly a year later, the Attorney General issued the

¹³⁴ Patton Opinion, *supra* note 113, at 3.

¹³⁵ See *supra* note 123.

¹³⁶ Williams Opinion, *supra* note 113, at 2.

¹³⁷ This mooring basin is dammed and by design the Mississippi River only communicates with the mooring basin at the river's highest levels.

Patton Opinion which squarely addressed the issue of improvements to the Mississippi River and to "navigable waters." As noted earlier, the Patton Opinion reasoned that improvements to the River were necessary to site vessels in the Delta because of the wide fluctuations in river stages. "Section 97-33-1(b) of the Mississippi Code . . . legalizes gaming 'on a vessel as defined in Section 27-109-1 whenever such vessel is *on* the Mississippi River or navigable waters within any county bordering on the Mississippi River.'" ¹³⁸ These improvements promote public safety and allow for appropriate commercial development. Such improvements are consistent with the expressed public policy of this state to protect public health and safety. ¹³⁹ From these premises, the Patton Opinion concluded:

[T]he Mississippi River and navigable waters may be improved and extended to accommodate development, provided such expansion can be characterized as part of such waters. In other words, the waters upon which the vessel floats must communicate during ordinary levels with the Mississippi River or navigable waters and be navigable in fact. ¹⁴⁰

Improvements along the Mississippi River range from the Isle of Capri's cofferdam in Vicksburg to Treasure Bay's mooring basin in Tunica County, which is connected to the Mississippi River via a several thousand foot artificial channel dredged in the batture land on the unprotected side of the Yazoo-Mississippi River Levee. ¹⁴¹ Each type of improvement dams its connection with the Mississippi River so that neither the waters nor the vessels can freely interchange with the River. Given this reality, how can the waters in these improvements communicate during ordinary levels with the Mississippi

¹³⁸ Patton Opinion, *supra* note 73, at 5.

¹³⁹ See *supra* note 53 and accompanying text. The Mississippi Legislature declared that Mississippi public policy requires gaming establishments to be "licensed, controlled and assisted to protect the public health, safety, morals, good order, and general welfare of the inhabitants of the state." MISS. CODE ANN. § 75-76-3(3)(c) (1991).

¹⁴⁰ Patton Opinion, *supra* note 73, at 7.

¹⁴¹ "Batture" land refers to that land between the Mississippi River and its levee formed by accretion. See BLACK'S LAW DICTIONARY 156 (6th ed. 1990).

River and be navigable-in-fact?

a. Ordinary Levels

Of the three cases cited by the Patton Opinion, only the South Carolina case of *Hughes v. Nelson*¹⁴² referred to "ordinary levels" through the use of the phrase "ordinary stage."¹⁴³ *Hughes* did not define or give any meaning to the term, nor does *State v. Columbia Water Power Co.*,¹⁴⁴ the case cited within *Hughes* for this concept. However, at least one case defines "ordinary stage" as that water stage which is "neither swollen by freshets nor shrunk by drought."¹⁴⁵

The case of *McCoy v. Danley*¹⁴⁶ addressed the issue of damages to land which arose when one person's dam caused a flood on the land of another.¹⁴⁷ At common law, no liability existed if the rainfall causing the flood was unusual; however, if flooding resulted after a usual freshet, the owner of the dam was liable for the damage.¹⁴⁸ The court addressed the meaning of "ordinary stage" for a body of water:

Ordinary: the error is in the use of that word. A distinction is taken between the ordinary stage of the water, and at

¹⁴² 399 S.E.2d 24 (S.C. 1990)

¹⁴³ *Hughes*, 399 S.E. 2d at 26. Neither *Kaiser Aetna v. United States*, 444 U.S. 164, 170-73 (1979), nor *United States v. Lamastus*, 785 F.2d 1349, 1353 (5th Cir. 1986), refer to this phrase.

¹⁴⁴ 63 S.E. 884 (S.C. 1909).

¹⁴⁵ *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922); see *Board of Trustees v. Walker Ranch Gen. Partnership*, 496 So. 2d 153, 156 n.3 (Fla. D. Ct. App. 1986) ("In his work *Florida Water Law*, 1980, Dean Maloney defines the ordinary low water mark as 'the usual and common or ordinary stage of the river, when the volume of water is not increased by rains or freshets, nor diminished below usual stage or volume by long continued drought, to extreme low water mark.'"); *Amoco Oil Co. v. State Highway Dept.*, 262 N.W.2d 726, 728 (N.D. 1978) ("[T]he thread of a stream is defined by one authority as 'the line midway between the opposite shore lines when the water is at its ordinary stage and neither swollen by freshets nor shrunk by droughts, no account being taken of main channel, current, or of line of greatest depth.'") (quoting 1 RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON TITLES § 140 (2d ed. 1957)).

¹⁴⁶ 20 Pa. 85 (1852).

¹⁴⁷ *McCoy*, 20 Pa. at 88.

¹⁴⁸ *Id.* at 89-90.

its ordinary stage at particular periods. The former is without meaning unless it means *the average stage*; for there is no ordinary stage, of any stream in this country for the year round. A man may make his dam according to the ordinary average, but not according to the average stage of the stream. But what is the ordinary stage? That depends upon seasons, and weather. The ordinary stage in ordinary rainy seasons is one thing, and in ordinary dry seasons, is another. The ordinary stage in March is high, in August, low. The ordinary rises of streams are matters which every one is expected to provided against, because, with ordinary care, he can calculate upon them.¹⁴⁹

Accordingly, "ordinary stage" does not refer to the "average" or "mean" level for the course of an entire year. Rather, "ordinary stage" comprehends a seasonal range including the ordinary high stage and the ordinary low stage for the body of water. In this context, ordinary excludes conditions not commonly and reasonably anticipated such as unexpected flooding or drought. As noted earlier, the improvements to the Mississippi River typically impede the interchange of waters between the improvement and the River.¹⁵⁰ The dams employed prevent the flooding and siltation of the improvements during the River's high water stage and maintain the water levels in the improvements during the River's fall. Thus, the Commission has not required actual communication during "ordinary levels." Apparently constructive communication will suffice, i.e., the improvement would communicate with the Mississippi River during its ordinary levels absent the artificial impediment.

b. Navigable-In-Fact

The navigable-in-fact test lies at the heart of all navigable waters definitions and is outlined in Part III.B. As explained *infra*, the Williams and Patton Opinions interpret the phrase "artery of commerce" in section 27-109-1(2) of the Mississippi

¹⁴⁹ *Id.* at 91 (Lowrie, J., concurring).

¹⁵⁰ See *supra* note 115 and accompanying text.

Code to impose the admiralty jurisdiction standard of navigability; i.e., the present capability to sustain interstate shipping.¹⁵¹ The improvements approved by the Commission cannot meet this standard. Part IV.B of this article suggests that the Commerce Clause standard of navigability harmonizes all the criterion contained in the "navigable waters" definition and would not conflict with present sites.

3. *West Bank of the Mississippi River*

In 1817, Mississippi's boundary with Arkansas and Louisiana was the thalweg of the Mississippi River.¹⁵² Since then the Mississippi has changed course by both avulsion and man-made cut-offs.¹⁵³ Neither event changed the Mississippi's boundaries with Arkansas or Louisiana, nor did it alter Mississippi's sovereignty over certain lands now west of the Mississippi River.¹⁵⁴ Regarding west bank sites, the Commission announced its policy that any proposed sites on the Mississippi River's west bank that requires primary access from a foreign jurisdiction is not suitable for licensure. Supporting this policy the Commission found (1) that gaming-related business revenue and economic development would primarily inure to the benefit of the foreign jurisdiction (2) that west bank sites would require primary access from the foreign jurisdiction, and (3) that the Commission's ability to strictly regulate the gaming operation would be impaired.¹⁵⁵ At its September 30, 1994, regular meeting, the Commission voted to adopt this policy but did not adopt it in the form of a regulation pursuant to the

¹⁵¹ Williams Opinion, *supra* note 113, at 4; Patton Opinion, *supra* note 73, at 4.

¹⁵² *Arkansas v. Mississippi*, 250 U.S. 39, 45 (1918).

¹⁵³ *Dycus v. Sillers*, 557 So. 2d 486, 500 (Miss. 1990). See generally BRAGG, *supra* note 115, at 87-191.

¹⁵⁴ *Arkansas v. Mississippi*, 252 U.S. 344, 345-46 (1920); *Dycus*, 557 So. 2d at 500. Conversely, such events did not alter Arkansas' or Louisiana's sovereignty to certain lands and waters east of the Mississippi River. Clearly, the Mississippi Gaming Commission could not license gaming operations on such waters.

¹⁵⁵ *Mississippi's West Bank Found Unsuitable*, The Southern Gaming Bulletin, Sept. 1994, at 1, 15.

Mississippi Administrative Procedures Act.¹⁵⁶

B. On "Navigable Waters" in the River Counties

The Act legalized dockside gaming on "navigable waters . . . within any county . . . bordering on the Mississippi River" ¹⁵⁷ Instead of using the existing definitions of navigable waters contained in sections 1-3-31 and 51-1-1 of the Mississippi Code,¹⁵⁸ the Legislature enacted a textually distinct definition under the Act.¹⁵⁹ According to this section, in pertinent part:

navigable waters means any rivers, creeks, bayous or other bodies of water within any county in this state bordering on the Mississippi River that are used or susceptible for being used as an artery of commerce and which either in their natural or improved condition" are used or suitable for use as an artery of commerce or are used for the docking or mooring of a vessel, notwithstanding interruptions between the navigable parts of such rivers, creeks, bayous or other bodies of water by falls, shallows, or rapids compelling land carriage.¹⁶⁰

The Commission interpreted this definition to require that the "navigable waters run into the Mississippi River."¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁵⁸ "All rivers, creeks and bayous in this state, twenty-five miles in length, and having sufficient depth and width of water for thirty consecutive days in the year to float a steamboat with carrying capacity of two hundred bales of cotton, are navigable waters of this state [and public highways]." MISS. CODE ANN. §§ 1-3-31 (1972); *Id.* § 51-1-1 (1990) (bracketed text represents phrase found in § 1-3-31 and not § 51-1-1).

¹⁵⁹ "Navigable waters' shall have the meaning ascribed to such term under Section 27-109-1." MISS. CODE ANN. § 75-76-5(x) (Supp. 1994).

¹⁶⁰ MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁶¹ Miss. Gaming Comm'n Reg. No. 2 (1990). If narrowly construed to require the navigable waters to directly flow into the Mississippi River, then only the Yazoo and Big Black Rivers could qualify as "navigable waters" under the Act. CORPS OF ENGINEERS, U.S. ARMY, 1992 FLOOD CONTROL AND NAVIGATION MAPS OF THE MISSISSIPPI RIVER (59th ed.) [hereinafter Mississippi River Maps] However, if more broadly construed to include those watercourses which indirectly flow into the Mississippi River through other navigable waters, then the Homochitto River, that portion of the Big Sunflower River in Coahoma County which runs

This definition represents a codification of existing case law on navigable waters and contains a series of limiting criteria.¹⁶² First, it defines navigable waters for gaming purposes to include "rivers, creeks, bayous or other bodies of water." As discussed in Part IV.B.1 of this article, the Williams Opinion interpreted this phrase to limit "navigable waters" to natural watercourses.¹⁶³ Second, such waters must lie in those Mississippi counties bordering the Mississippi River. Third, this definition embodies a two-pronged navigable-in-fact test. A natural watercourse must be "used or susceptible of being used as an artery of commerce," and must be in either its "natural or improved condition so that it can be used "as an artery of commerce or [be] used for the docking or mooring of a [dockside gaming] vessel."¹⁶⁴ The Williams and Patton Opinions construed the standard imposed by this two-prong test according to admiralty precedent.¹⁶⁵ Part IV.B.2 outlines the standards adopted in the Williams and Patton Opinions, and Part IV.B.3 examines whether their admiralty approaches are logically consistent with other criteria in section 27-109-1(2) of the Missis-

through Clarksdale, and a portion of the Coldwater River in Tunica County could qualify as "navigable waters" if they are determined navigable-in-fact by the Mississippi Gaming Commission. *Id.*

¹⁶² Section 27-109-1(2)'s definition of "navigable waters" contains striking similarities to the Federal Power Act's definition of "navigable waters" which provides:

"Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or [are] suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids

16 U.S.C. § 796(d)(8) (1994). As the Federal Power Commission explained, this definition was a codification of existing case law. *Rochester Gas and Elec. Corp.*, 32 F.P.C. 668 (1964).

¹⁶³ Williams Opinion, *supra* note 113, at 4.

¹⁶⁴ MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁶⁵ Williams Opinion, *supra* note 113, at 4; Patton Opinion, *supra* note 73, at

ssippi Code (particularly the interruptions language which follows in the definition). This part concludes with an examination of the Commission's approval of a site on the Big Black River in light of the admiralty and Commerce Clause standards.

1. *Natural Watercourses*

Section 27-109-1(2) of the Mississippi Code limits "navigable waters" to "rivers, creeks, bayous, or other bodies of water within any county in this state bordering on the Mississippi River" ¹⁶⁶ Representative Kenneth Williams of Clarksdale, in Coahoma County, requested an opinion from the Attorney General addressing the general criteria for "navigable waters" and particularly whether the phrase "other bodies of water" included lakes. In response, the Attorney General issued an opinion, which logically argued that "navigable waters" comprehended only natural watercourses and not landlocked waters or man-made watercourses. ¹⁶⁷ This opinion noted that the general phrase "other bodies of water" followed an enumeration of the specific terms "rivers," "creeks," and "bayous." ¹⁶⁸ The opinion applied the statutory construction rule of *ejusdem generis* and reasoned that "other bodies of water" referred to a natural watercourse. ¹⁶⁹ According to the Williams Opinion, the common characteristic of the specific terms "is the notion of a flowing, natural watercourse, or a natural body of water which connects directly with other flowing watercourses." ¹⁷⁰ Based on the foregoing, the opinion concluded that "other bodies of water . . ." did not include "artificially created lakes, ponds, borrow pits or other bodies of water." ¹⁷¹ This natural versus artificial dichotomy has limited practical importance given the breadth of improvements to the Mississippi River

¹⁶⁶ MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁶⁷ Williams Opinion, *supra* note 113, at 1, 3-4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

under the Patton Opinion or those approved by the Commission.

2. *The Standard for Navigability*

The Mississippi Legislature has enacted a two-part navigable-in-fact test. The natural watercourse must be "used or susceptible of being used as an artery of commerce and which either in their natural or improved condition are used or suitable for use as an artery of commerce or are used for the docking or mooring of a vessel"¹⁷² The Williams Opinion broke this cumbersome clause down into two avenues by which a natural watercourse would qualify as "navigable waters." First, the natural watercourse would qualify if it was used as an artery of commerce.¹⁷³ Second, a watercourse used for the docking or mooring of a gaming vessel would qualify if it were also susceptible of being used as an artery of commerce.¹⁷⁴ To clarify the meaning of "artery of commerce," the Williams Opinion relied upon the admiralty cases of *Adams v. Montana Power Co.*¹⁷⁵ and *Madole v. Johnson*.¹⁷⁶ *Adams* and other admiralty jurisdiction cases define navigable waters as those "used or susceptible of being used as an artery of commerce."¹⁷⁷ According to *Madole*, waters constitute an artery of commerce "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."¹⁷⁸ In paraphrasing *Madole*, the Williams

¹⁷² MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁷³ Williams Opinion, *supra* note 113, at 5.

¹⁷⁴ *Id.*

¹⁷⁵ 528 F.2d 437 (9th Cir. 1975). *Adams* condensed *The Daniel Ball's* definition of navigable waters, stating "[a] waterway is navigable provided that it is used or susceptible of being used as an artery of commerce." *Id.* at 439; *see infra* note 188 and accompanying text.

¹⁷⁶ 241 F. Supp. 379 (W.D. La. 1965).

¹⁷⁷ *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989); *Finneseth v. Carter*, 712 F.2d 1041, 1046 (6th Cir. 1986); *Adams*, 528 F.2d at 439.

¹⁷⁸ *Madole*, 241 F. Supp. at 381 (emphasis omitted).

Opinion stated that an "artery of commerce" is part of a "continuous highway" of interconnecting waterways.¹⁷⁹

The Patton Opinion reasoned that the "use of the term, 'artery of commerce' signifies the Legislature's intent to adopt a stricter test for navigability than that found in *Dycus v. Sillers* and *Downes v. Crosby Chemicals, Inc.*"¹⁸⁰ Both *Dycus* and *Downes* involved the issue of whether the particular waters were subject to public servitude.¹⁸¹ The navigable threshold for waters in public servitude cases includes commercial, sport, or recreational fishing.¹⁸² Such public uses establish a threshold significantly below the practical requirement that "the waterway must be of a sufficient size to accommodate a gaming 'vessel' having a minimum overall length of one hundred fifty (150) feet."¹⁸³ On this issue, the Patton Opinion concluded that "[t]he factual determination as to whether a given body of water is an artery of commerce [under the Gaming Control Act] cannot be made by this office, and is left to the discretion of the Mississippi Gaming Commission."¹⁸⁴

As noted earlier, the Mississippi Legislature apparently borrowed concepts developed in navigable waters cases and pieced them together to form the definition of navigable wa-

¹⁷⁹ Williams Opinion, *supra* note 113, at 5.

¹⁸⁰ Patton Opinion, *supra* note 73, at 5 (citations omitted). This opinion also contradicted the finding in the Williams Opinion that the interruptions language "effectively removes from consideration of the flow measurements and carrying capacity definitions employed in other definitions of 'navigability.' See, e.g., Williams Opinion, *supra* note 113, at 5; MISS. CODE ANN. § 51-1-1 (1990)." According to the Patton Opinion, §§ 27-109-1 and 51-1-4 must be read in *pari materia*, and such a reading leads to the conclusion that the "artery of commerce test establishes a minimum flow requirement." Patton Opinion, *supra* note 73, at 5. This conclusion assumes that § 27-109-1(2)'s definition of navigable waters is in *pari materia* with § 51-1-4's criteria for public waterways but fails to explain how both statutes relate to the same thing or have a common purpose. This conclusion simply ignores the fact that the Legislature obviously saw a distinction between the two contexts since it enacted a textually distinct definition for gaming and expressly carved out an exception for this definition in § 51-1-1.

¹⁸¹ *Dycus v. Sillers*, 557 So. 2d 486, 487 (Miss. 1990); *Downes v. Crosby Chem., Inc.*, 234 So. 2d 916, 917 (Miss. 1970).

¹⁸² *Dycus*, 557 So. 2d at 498.

¹⁸³ Patton Opinion, *supra* note 73, at 6.

¹⁸⁴ *Id.*

ters.¹⁸⁵ In *Kaiser Aetna v. United States*,¹⁸⁶ the United States Supreme Court admonished that "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case."¹⁸⁷ According to *Kaiser Aetna*, these purposes include:

- [a] to delimit the boundaries of the navigational servitude . . . ;
- [b] to define the scope of Congress' regulatory authority under the Interstate Commerce Clause;
- [c] to determine the extent of authority of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899 ["Section 10"]; and
- [d] to establish the limits of jurisdiction of the federal courts conferred by Art. III, § 2, of the United States Constitution over admiralty and maritime cases.¹⁸⁸

The Williams and Patton Opinions relied upon admiralty jurisdiction cases to construe the navigable-in-fact test of section 27-

¹⁸⁵ See *supra* note 162 and accompanying text.

¹⁸⁶ 444 U.S. 164 (1979).

¹⁸⁷ *Kaiser Aetna*, 444 U.S. at 171.

¹⁸⁸ *Id.* at 171-72 (citations omitted); *Finneseth v. Carter*, 712 F.2d 1041, 1043 (6th Cir. 1983). Regardless of the context, all "navigable waters" cases have a lineage back to *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). In *The Daniel Ball*, the Supreme Court expressed the "navigable-in-fact" test for navigable waters as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. (10 Wall.) at 563. Hence, interstate commerce in the form of trade and travel on water has been the legal touchstone of the navigable-in-fact test in each context noted in *Kaiser Aetna*.

109-1(2); but these opinions failed to incorporate the admiralty definition of "commerce," which states "[c]ommerce for the purpose of admiralty jurisdiction means activities related to the business of shipping."¹⁸⁹ Further, unlike navigability in Commerce Clause cases, admiralty jurisdiction does not consider future use through reasonable improvements.¹⁹⁰ Thus, "used or susceptible for use as an artery of commerce" requires a watercourse to be capable in its present condition to sustain interstate shipping.¹⁹¹ As noted in Parts IV.B.3 and 4, when plugged into the code's navigable-in-fact test, this admiralty standard produces untoward results.

3. Reasonable Improvements

If the first part of the navigable-in-fact test is construed according to admiralty jurisdiction precedent, then "used or susceptible for use as an artery of commerce" would require the watercourse to have the present capability to support interstate shipping. If so, then what purpose does the lesser standard in the second part of the test serve? A watercourse with the present capability to support interstate shipping would without a doubt be either "used or suitable for use as an artery of commerce" or "for the docking or mooring of a vessel." Hence, to impose this admiralty standard has the practical effect of rendering the second part of the navigable-in-fact test inoperative or superfluous, and such construction should be avoided.¹⁹²

¹⁸⁹ *Adams*, 528 F.2d at 439.

¹⁹⁰ *Id.* at 440-41.

¹⁹¹ *Grice v. Grice*, 929 F.2d 131, 133-34 (4th Cir. 1991); *Finneseth*, 712 F.2d at 1047; *Richardson v. Foremost Ins. Co.*, 641 F.2d 314, 316 (5th Cir. 1981), *aff'd*, 457 U.S. 668 (1982). Some argue that *Adams* imposes the "soft version" of the contemporary navigability-in-fact standard—a stricter standard which requires not only physical capability criteria, but also a likelihood of interstate shipping on the watercourse. John F. Baughman, Note, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 MICH. L. REV. 1028, 1043-44 (1992). However, for our purposes, the lesser standard, physical capability alone, suffices to draw the distinction between the navigability standard for admiralty jurisdiction and Commerce Clause precedent.

¹⁹² A fundamental rule of statutory construction requires a reading most coherent in principle and giving full effect to each provision. *Quarles v. St. Clair*,

However, the standard applied in Commerce Clause cases, when plugged into the navigable-in-fact test, allows for a more harmonious construction. In *United States v. Appalachian Electric Power Company*,¹⁹³ the United States Supreme Court explained the meaning of the phrase "used or susceptible to being used" in the definition of navigable waters.¹⁹⁴ According to the Court, the effect of reasonable improvements must be considered in determining navigability.¹⁹⁵ "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken."¹⁹⁶ Thus, if a watercourse has a sufficient volume of water, gradients, and regularity of flow to support commercial navigation but requires reasonable improvements to make the watercourse actually navigable, then such watercourse constitutes navigable water.¹⁹⁷ With this construction, the first part of the navigable-in-fact test ("used or susceptible of being used as an artery of commerce") focuses on the watercourse's actual use or potential as an artery of commerce. Given such potential, the second part ("which either in their natural or improved condition are an artery of commerce or for the docking or mooring of a vessel") then considers the use or capability of the watercourses with reasonable improvements. Thus, effect is given to both parts of the navigable-in-fact test when construed according to Commerce Clause precedent.

711 F.2d 691, 698-99 (5th Cir. 1983); *Genty v. Wallace*, 606 So. 2d 1117, 1122-23 (Miss. 1992). Thus, "interpretations which render parts inoperative or superfluous are to be avoided." *Quarles*, 711 F.2d at 701 n.32.

¹⁹³ 311 U.S. 377 (1940).

¹⁹⁴ *Appalachian Elec. Power Co.*, 311 U.S. at 407-08.

¹⁹⁵ *Id.* at 408.

¹⁹⁶ *Id.* at 407.

¹⁹⁷ *Id.* at 407-08. The concept of "reasonable improvements" defies a bright line test. The reasonableness of improvements involves a balancing between the "cost and need at a time when the improvements would be useful." *Id.*

4. Interruptions

The Mississippi Code deems waters navigable "notwithstanding interruptions between the navigable parts of such rivers, creeks, bayous, or other bodies of water by falls, shallows, or rapids compelling land carriage."¹⁹⁸ This caveat appears to have its origin in *The Montello*,¹⁹⁹ and was later applied in *Economy Light & Power Co. v. United States*²⁰⁰ and *Appalachian Electric Power Company*, where the United States Supreme Court recognized that natural interruptions, such as "falls, rapids, sand bars, carries or shifting currents" did not destroy the navigable character of a waterway.²⁰¹ This interpretation had its roots in the Commerce Clause precedent construing navigable waters.²⁰²

Although the Williams Opinion used the admiralty jurisdiction standards of navigability, it also concluded that according to interruptions language:

[I]t is not essential that the flow of water be sufficient at all times, or at all points, to constitute an "artery of commerce." It is sufficient if there exists a naturally occurring channel or stream-bed connecting to the "continuous highway" of water-courses, which contains some naturally occurring flow of water at ordinary water levels.²⁰³

Using the admiralty standard to define navigability also creates a significant logical inconsistency with the interruptions language of the code's definition of navigable waters. Admiralty jurisdiction extends to those inland waterways capable of accommodating interstate shipping.²⁰⁴ In admiralty, if a vessel could not reach the Mississippi River because of "falls,

¹⁹⁸ MISS. CODE ANN. § 27-109-1(2) (1990).

¹⁹⁹ 78 U.S. (11 Wall.) 441 (1870).

²⁰⁰ 256 U.S. 113, 121-22 (1921).

²⁰¹ *Appalachian Elec. Power Co.*, 311 U.S. at 409.

²⁰² *Id.* at 408-09.

²⁰³ Williams Opinion, *supra* note 113, at 5.

²⁰⁴ *Id.* (citing *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975)).

shallows, or rapids" then the watercourse could not sustain interstate shipping; therefore, it would not be navigable-in-fact.²⁰⁵ Such logic extends to artificial interruptions such as dams. In *Adams*, the court found that a twenty-five mile stretch of a river with a dam at each end, located wholly in Montana, and only used by non-commercial fisherman, water skiers, and pleasure boaters was not navigable waters for admiralty purposes.²⁰⁶

5. *The Big Black River*

Apparently the only natural watercourse flowing into the Mississippi River which actually supports, or is likely to support interstate shipping is the Yazoo River, which reaches the Mississippi River through the Yazoo Diversion Canal. However, the Commission has approved a site on the Big Black River.²⁰⁷ This site is located at the Highway 61 bridge approximately seventeen miles south of Interstate 20 in Vicksburg and approximately six to seven miles inland from the Mississippi River.²⁰⁸ The Big Black River does not actually support interstate shipping, nor is it likely to support such shipping. Therefore, under the admiralty standard, the Commission must find that the river presently has the physical capability to support interstate shipping. However, observations regarding the physical characteristics of the Big Black River by the Mississippi River Commission and the U.S. Army Corps of Engineers call this capability into question.²⁰⁹ According to the Mississippi River Commission:

During the steamboat era, the Big Black was considered a navigable stream, but only a few small steamers dared to try to navigate the channel that was obstructed by snags, rocks,

²⁰⁵ See *Montana Power Co. v. Federal Power Comm'n*, 185 F.2d 491, 494-95 (D.C. Cir. 1950) (discussing effects of obstructions in navigability of Missouri River), *cert. denied*, 340 U.S. 947 (1951).

²⁰⁶ *Adams*, 528 F.2d at 441.

²⁰⁷ *Gaming Sites*, SOUTHERN GAMING BULLETIN, Sept. 1994, at 2.

²⁰⁸ *Id.*

²⁰⁹ BRAGG, *supra* note 115, at 172.

and overhanging trees. In 1881 the Corps of Engineers began a project to improve the river for navigation, but the work was halted in 1894 when local interests constructed fixed bridges beyond which boats could not travel.

Today parts of the Big Black are almost as wild as when the first settlers arrived. The river basin is almost entirely undeveloped, with no large towns located among the river's twisting course. The stream rises and falls with great rapidity, and frequently floods the farm fields, pastures, and swamps that lie along its banks.²¹⁰

Further, the Corps has noted that "[b]etween January and June the depth will exceed 4 ft., [but for the] remainder of year controlling depth is 1 to 2 ft."²¹¹ Based on these observations, the Big Black River probably would not pass muster as navigable waters in admiralty. However, these observations do not exclude a finding of seasonal navigability for that portion of the Big Black River between the proposed gaming site and the confluence of the Big Black with the Mississippi River.²¹² But as noted,²¹³ this is a question of fact for the Commission to resolve.

In contrast, the Big Black River would readily qualify as "navigable waters" under the Commerce Clause standard of navigability. This standard embodies the concepts of "indelible navigability"; i.e., once found navigable-in-fact, always navigable in law. Thus, past use by steamers supports a finding of navigability. The Commerce Clause standard and section 27-109-1(2) of the Mississippi Code adopts the concept of "prospective navigability"; i.e., navigable-in-fact after reasonable improvements.²¹⁴ Further, under the Commerce Clause and sec-

²¹⁰ *Id.*

²¹¹ Mississippi River Maps, *supra* note 161, at SHEET 9.

²¹² Seasonal navigability alone does not render otherwise navigable waters non-navigable. *Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1377 (5th Cir. 1988). However, navigability must be "as regular as the seasons and of a duration long enough to be useful and valuable in transportation." STEVEN F. FRIEDEL, 1 BENEDICT ON ADMIRALTY § 142, at 9-7 (7th ed. 1994).

²¹³ See *supra* notes 57, 111 and accompanying text.

²¹⁴ *United States v. Appalachian Power Co.*, 311 U.S. 377, 406-09 (1940).

tion 27-109-1(2) of the Mississippi Code, interruptions such as its rapid rises and falls would not impair its navigable status. Finally, the Big Black is also subject to Army Corps of Engineers jurisdiction.²¹⁵ Thus, the Commerce Clause standard of navigability as outlined above, rather than the admiralty jurisdiction standard, is more consistent with the Code's definition of "navigable waters" and the Commission's siting decisions, both on "navigable waters" and on improvements to the Mississippi River, under the navigable-in-fact requirement.

V. ARE DECISIONS OF THE MISSISSIPPI GAMING COMMISSION ON LICENSING AND SITE SUITABILITY REVIEWABLE?

Inherent in every controversial site approval hearing to date has been the issue of whether the licensing decision of the Mississippi Gaming Commission is subject to judicial review. Closely related is the question of whether a Commission decision on site suitability is reviewable, as a determination on site

²¹⁵ Mississippi River Maps, *supra* note 161, at SHEET 9. However, the breadth of this standard would require the Commission to exercise its discretion to find otherwise legal gaming sites unsuitable because that portion of the Big Sunflower River flowing through Clarksdale, in Coahoma County, and that portion of the Coldwater River in Tunica County, both subject to Army Corps of Engineers jurisdiction, are arguably navigable under the Commerce Clause standard.

Such discretion finds its basis in the public policy expressed by the Mississippi Legislature. The Legislature declared the public policy of this state to require the strict regulation of all locations of licensed gaming establishments in order to maintain public confidence and trust. MISS. CODE ANN. § 75-76-3(3)(b) (1991). As noted earlier, the public policy of Mississippi also requires licensing of gaming establishments to "protect the public health, safety, morals, good order and general welfare of the inhabitants of the state." *Id.* § 75-76-3(3)(c). The Legislature also instructed the Executive Director of the Mississippi Gaming Commission to ensure that gaming operations are not conducted in "unsuitable or prohibited places or locations." *Id.* § 75-76-29(1). If a proposed location is a legal site under the act but is found unsuitable by the Commission, it has "full and absolute power and authority to deny [the] application." *Id.* § 75-76-29(3). To this end, the Commission promulgated regulation II.B. § 1 which defines unsuitable locations. According to this regulation, unsuitable locations include "[p]remises lacking adequate supervision or surveillance," "premises difficult to police, or where adequate fire protection may be difficult," or "[a]ny other premises where the conduct of gaming would be inconsistent with the public policy of the State of Mississippi." Miss. Gaming Comm'n Reg. II.B. § 1(e)-(g), at 43 (emphasis omitted).

suitability precedes and is separate from the Commission's licensing decision.²¹⁶ Although a right to appeal an administrative decision does not exist in the absence of clear statutory authority,²¹⁷ a review of the provisions of the Gaming Control Act offers seemingly contradictory guidance on this subject. Note the following relevant statutes:

No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter is a revocable privilege, and no holder acquires any vested right therein or thereunder.²¹⁸

Any license issued or other commission approval granted pursuant to the provisions of this chapter is a revocable privilege, and no holder acquires any vested right therein or thereunder. The initial decision of the commission to deny, limit, condition or restrict a license shall be final.²¹⁹

The judicial review by the circuit and Supreme Courts afforded in this chapter is the exclusive method of review of the commission's actions, decisions and orders in disciplinary hearings. Judicial review is not available for actions, decisions and orders of the commission relating to the denial of a license or to limited or conditional licenses. Extraordinary common law writs or equitable proceedings are available except where statutory judicial review is made exclusive or is precluded or where the use of those writs or proceedings is precluded by specific statute.²²⁰

From the above it appears that, while judicial review is not available for Commission decisions which deny, limit, condition or restrict a license or other Commission approval, Commission *grants* of licenses or approvals are reviewable. However, section

²¹⁶ See MISSISSIPPI GAMING COMMISSION PROCEDURAL FACT SHEET FOR GAMING LICENSE (October 21, 1993); Memorandum Opinion, *supra* note 53, at 1-2.

²¹⁷ Bickham v. Department of Mental Health, 592 So. 2d 96, 97-98 (Miss. 1991).

²¹⁸ MISS. CODE ANN. § 75-76-3(5) (1991).

²¹⁹ *Id.* § 75-76-29(4).

²²⁰ *Id.* § 75-76-127(2).

75-76-121(1) is not so restrictive: "Any person aggrieved by a final decision or order of the commission may obtain a judicial review thereof in the circuit court of the county in which the petitioner resides or has his principal place of business."²²¹

This apparent statutory contradiction regarding judicial review has been argued in appeals of Commission site decisions for both the Ladner²²² and the Royal sites,²²³ but not the Pine Hills site.²²⁴ Casino opponents cite the statutory authority restricting judicial review and claim that section 75-76-121(1) of the Mississippi Code is available only in instances of disciplinary hearings, and, in any event, is not available after site review decisions because of their preliminary, and not final, nature.²²⁵ Proponents read that statute more broadly and note that the Gaming Commission itself has stated that its order approving a site is "a final order insofar as site approval is concerned."²²⁶ In light of this issue's unsettled nature and its relevance to the substantive law regarding gaming site suitability, the following matters will be examined:²²⁷ (1)

²²¹ *Id.* § 75-76-121(1).

²²² See *supra* notes 23-40 and accompanying text. The Circuit Court of Hancock County found jurisdiction to hear an appeal of an unfavorable site decision of the Commission, and subsequently overturned the decision. The matter was appealed to the Mississippi Supreme Court and presently awaits disposition.

²²³ See *supra* notes 79-111 and accompanying text. The Circuit Court of Harrison County found jurisdiction to hear an appeal of an unfavorable site decision of the Commission, and subsequently overturned the decision. This matter was appealed to the Mississippi Supreme Court and presently awaits disposition.

²²⁴ See *supra* notes 41-78 and accompanying text. The Circuit Court of Hinds County affirmed a favorable site decision of the Commission after the parties mutually agreed that the decision was reviewable under MISS. CODE ANN. § 75-76-121 (1991). See Brief of Appellees at 4, Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n (Miss., July 8, 1994) (No. 94-TS-0235). The matter was appealed to the Mississippi Supreme Court, and its decision is pending.

²²⁵ Brief of Appellees at 1-2, Ladner v. Mississippi Gaming Comm'n (Cir. Ct. of Hancock County, Miss., Sept. 24, 1991) (No. 11,257).

²²⁶ See Memorandum Opinion, *supra* note 53, at 2, which was promulgated during the Pine Hills proceedings.

²²⁷ This situation is not the first opportunity in which a Mississippi court has had to define the rights of gaming license holders and applicants. Shortly after the Civil War, the United States Supreme Court affirmed a Mississippi Supreme Court decision denying relief to a lottery company. *Stone v. Mississippi*, 101 U.S. 814, 821 (1879). In that case, the Legislature granted a lottery license to the Mis-

whether casino interests have a right to appeal the denial of a license by the Mississippi Gaming Commission; (2) whether a third party has a right to appeal the grant of a casino license by the Commission; and (3) whether casino operators have a right to an interlocutory appeal from an adverse decision by the Commission on site suitability.

A. Do Casino Interests Have a Right to Appeal the Commission's Denial of a License?

1. Nevada Gaming Law and its Influence on Mississippi

At least one section of the Mississippi Gaming Control Act specifically denies a right of appeal from a final licensing decision.²²⁸ Since the Act is based upon Nevada law, Nevada deci-

ssissippi Agricultural and Manufacturing Aid Society, a charitable company. *Id.* at 814. However, the 1868 Constitution prohibited gambling, and the state attempted to end the lottery's operation. *Id.* at 815. The lottery company argued it exercised the rights afforded by its license and those rights were not curtailed by the recent constitution or other legislative enactments. *Id.* at 816. The United States Supreme Court held that no impairment existed because a license merely authorizes "a suspension of certain governmental rights in [the Company's] favor, subject to withdrawal at will." *Id.* at 821.

²²⁸ See MISS. CODE ANN. § 75-76-127(2) (1991). The statute denies judicial review "for actions, decisions and orders of the commission relating to the denial of a license or to limited or conditional licenses." *Id.* However, proponents of a right to appeal for denial of a gaming license point to § 75-76-121(1), which allows judicial review for any person "aggrieved by a final decision or order" of the state gaming commission. Rebuttal Brief of the Appellants at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257); Brief of Appellants at 1, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994 (No. A-2401-94-00211); Rebuttal Brief of Appellants at 4, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Sept. 19, 1994) (No. A-2401-94-00211).

Opponents of such a right to appeal note that § 75-76-121 of the Mississippi Code falls under a section of the Gaming Control Act entitled "Disciplinary Actions," and thus argue that its application is limited to such occasions. Brief of the Appellants at 8-9, *Mississippi Gaming Comm'n v. Ladner* (Miss., Nov. 7, 1994) (No. 94-TS-0299); Brief of the Appellees at 2-6, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Sept. 2, 1994) (No. A-2401-94-00211). However, the heading "Disciplinary Actions" was inserted by the publisher of the Mississippi Code as a finding aid and is not part of the official text of the Mississippi Gaming Control Act. Editor's Note, MISS. CODE ANN. Vol. 17, at 642 (1991).

sions exert a strong persuasive influence upon Mississippi gaming laws.²²⁹ The Mississippi Attorney General's Office relies upon Nevada cases to support its contention that the judiciary lacks the authority to intervene in Commission decisions.²³⁰ One of the primary cases in support of disallowing judicial review is *Nevada v. Glusman*,²³¹ where the Nevada Supreme Court determined that the legislature has the authority to limit the judiciary's ability to intervene in gaming licens-

²²⁹ Carole Brand Edds, Mississippi Gaming Commission Litigation at 2 (1993) (available from Mississippi Attorney General's Office). The Attorney General's Office "looks to Nevada precedent for guidance" in these areas, as Mississippi interpretation of its own act is still very undeveloped. *Id.* Most observers find no property right to a casino license under Nevada law, as it is a revocable privilege. Claudia K. Cormier & Robert D. Faiss, *The International Effect of the Nevada Gaming Control Act*, 16 SW. U. L. REV. 437, 439 n.9 (1986); Edds, *supra* at 3-5.

Applicants for a casino license could question the effective distinction between a right and a privilege under administrative law upon which the Commission bases so much of its argument. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458 (1968). This author asserts that due process and equal protection analyses have "ground down" that distinction so that both areas are reviewable. *Id.*; see also *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964) (asserting that calling license "a privilege" does not free agency from due process requirements). The argument against such a distinction is that a statute's announcement that a license is "a privilege only" does deny a right to relief from an administrative decision, but such a pronouncement does not announce why the court should deny relief. Van Alstyne, *supra* at 1459.

²³⁰ Edds, *supra* note 229, at 3-5; see also Brief of Appellees at 3-4, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 24, 1992) (No. 11,257); Brief of the Appellants at 10-11, *Mississippi Gaming Comm'n v. Ladner* (Miss., Nov. 7, 1994) (No. 94-TS-0299); Brief of the Appellees at 9-10, 16-17, *Board of Educ. v. Mississippi Gaming Comm'n* (No. A-2401-94-00211). The Attorney General's Office uses Nevada's characterization of gaming as a business requiring unique regulation to support its assertion for lack of judicial review of administrative decisions in gaming. Edds, *supra* note 229, at 3-4. Also, one may look to the statutory purpose behind the Gaming Act which explains that the purpose of this regulation is to ensure a healthy, crime-free gaming environment. MISS. CODE ANN. § 75-76-3(a) (1991). Nevada courts have justified a lack of judicial review in their state on the basis that the gaming commission is uniquely qualified to ensure such an environment exists. *Nevada v. Rosenthal*, 559 P.2d 830, 833-34 (Nev.), *appeal dismissed*, 434 U.S. 803 (1977). Although the *Rosenthal* court did not refer to the licensing statute, its announced rationale does help explain why administration decisions on licensing are final.

²³¹ 651 P.2d 639 (Nev. 1982), *appeal dismissed*, 459 U.S. 1192 (1983).

ing matters.²³² The *Glusman* court stated that "[t]he power of the legislature to restrict the availability of injunctive relief by the judiciary in gaming matters is well established."²³³

Subsequent Nevada cases have relied on *Glusman* and its supporting statutory authority to hold that state law carries a "general principle of non-intervention" by the judiciary into the Nevada Gaming Commission's final decisions and orders.²³⁴ Accordingly, federal courts interpreting Nevada law have denied that a property interest in a casino license inherently exists in common law, or as created by the state, under due process analysis.²³⁵ In *State Gaming Control Board v. District*

²³² *Glusman*, 651 P.2d at 648. Although the *Glusman* court never addressed the issue of a party's right to appeal an adverse decision, this case is primary support for the position that the state is allowed great discretion in regulating the casino industry. Edds, *supra* note 229, at 3; see also Brief of Appellees at 3-4, *Ladner* (No. 11,257); Brief of the the Appellants 10-11, *Ladner* (No. 94-TS-0299); Brief of the Appellees at 9-10, 16-17, *Board of Educ.* (No. A-2401-94-00211) (advocating following Nevada's discretionary policy for gaming agencies).

²³³ *Glusman*, 651 P.2d at 643 (citing *State Gaming Control Bd. v. District Ct.*, 409 P.2d 974, 975 (Nev. 1966)). The *Glusman* Court used Nevada Revised Statutes section 463.343(5)(b) to support its position that no "injunctive relief" or any other relief based on an extraordinary common law writ exists for an applicant for a gaming license, or for any party required to obtain a Commission's finding of suitability. *Id.* at 643. However, other states have asserted that judicial review is available whenever allowed by statute, or when the administrative decision impinges on a constitutional or "vested property" right. *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385, 385-86 (Tex. 1967); see also *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (en banc) (stating "the legislature [may not] alter the principal power of the judiciary to make the final review" of administrative decision).

²³⁴ *Resnick v. Nevada Gaming Comm'n*, 752 P.2d 229, 230 (Nev. 1988). The court relied on this "non-intervention" principle in denying the petitioner the ability to obtain from the Commission, through discovery, a copy of the investigative report it compiled while determining petitioner's suitability to receive a gaming license. *Resnick*, 752 P.2d at 233.

²³⁵ *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). The *Jacobson* court determined that no protectable property interest existed requiring due process. *Id.* at 180. The court supported its position by asserting that the Nevada Gaming Control Act created no "expectation of entitlement to a license sufficient to create a property interest." *Id.* The Ninth Circuit also found that the procedural restrictions given in the Act were insufficient to create a property interest, since they did not operate as a restriction on the power of the state's gaming commission. *Id.*; see also *Kraft v. Jacka*, 669 F. Supp. 333, 337-38 (D. Nev. 1987) (finding members of Nevada Gaming Commission immune from § 1983 action

Court,²³⁶ the Nevada Supreme Court grounded the "non-intervention" principle upon the interpretation of Article Six, Section Six of the Nevada Constitution, which "does not authorize court intrusion into the administration, licensing, control, supervision and discipline of gaming."²³⁷ However, the Nevada Supreme Court appeared to introduce ambiguity under this interpretation when, in the very next sentence of that opinion, it asserted that the Nevada courts could review final decisions of the Nevada Gaming Commission.²³⁸ This problem was resolved by *Nevada v. Rosenthal*,²³⁹ which restricted judicial review to the Commission's revocation of casino licenses already in existence.²⁴⁰

It is evident that Nevada's gaming statutes and relevant

because plaintiffs had no right to Nevada gaming license allegedly taken away by Commission's decision), *aff'd*, 872 F.2d 862 (9th Cir. 1989). Legal observers have concluded that the very lack of accountability in discretion of casino licensing boards, as well as other administrative agencies, acts to shut off any creation of due process rights for that license or other administrative benefit. Tim Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1021 n.17 (1986). In contrast, more carefully-drafted procedures for these boards may create unwanted (on the part of the state) due process rights for applicants to their licenses. *Id.* at 1021. As a result, modern due process analysis, as applied to casino regulations, may actually discourage "administrative agencies and even legislatures from establishing rules that control adjudicative discretion." *Id.* at 1022.

²³⁶ 409 P.2d 974 (Nev. 1966).

²³⁷ *State Gaming Control Bd.*, 409 P.2d at 975. Article Six of the Nevada Constitution does not expressly forbid court intrusion in gaming affairs, but merely states the limits of original jurisdiction in the district courts. *Id.*

²³⁸ *Id.*

²³⁹ 559 P.2d 830 (Nev. 1977).

²⁴⁰ *Rosenthal*, 559 P.2d at 834. In determining that legislative intent was to restrict judicial review only to individuals who had licenses revoked, not denied, the court relied upon the placement of the judicial review statute under the disciplinary actions section of the Act. *Id.* In fact, *Rosenthal* is clearly distinguishable from the issue of appeal from final decisions on whether to grant a license or not for exactly that reason.

Furthermore, the *Rosenthal* court attempted to restrict federal judicial review by asserting that the Tenth Amendment of the United States Constitution reserved gaming as a matter to the states. *Id.* at 836. As a result, the court held that no "federally protected constitutional rights" existed for the federal courts to protect. *Id.* Despite *Rosenthal*, the federal courts have forayed into rights of casino applicants. *Jacobson*, 627 F.2d at 180.

case law do not favor the reviewability of its gaming commission's licensing decisions. However, since the Nevada Supreme Court decided *State Gaming Control Board* as an interpretation of state constitutional law, license applicants in Mississippi may assert that the rights of casino interests in Mississippi are different from interests in Nevada. The Mississippi Supreme Court could disagree with Nevada and define a common-law right to judicial review from an administrative action. Alternatively, the court could base its decision on administrative law, and reach a decision contrary to Nevada's on entirely different grounds.

2. Mississippi and Federal Constitutional Law: Can the Legislature Define the Judiciary's Power of Review?

The Mississippi Constitution extends several rights of redress in the courts. These rights could arguably extend an interest sufficient for a right of appeal from an adverse licensing decision by the Commission, even if a "right to a casino license" does not exist per se.²⁴¹

Although the Mississippi Supreme Court chose to refrain "from interfering with duly delegated authority . . . where the rule making power of the [administrative] agency is involved,"

²⁴¹ MISS. CONST. art. III, § 24. The requires that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. . . ." *Id.* The early Mississippi courts used this article to proscribe the Legislature's ability to take away an existing and vested right of appeal. *Commercial Bank v. Chambers*, 16 Miss. (8 S. & M.) 9, 56 (1847). Justice Sharkey held "[w]hen any vested right is taken away, or the obligation of any contract is impaired, the act is so far void." *Id.* The crux of the problem in this situation is whether a legislature could avoid the *Commercial Bank* requirement of rights to appeal for injury by stating in its act that a casino interest has no right to a license. The Mississippi Constitution also extends a right of due process identical to the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. MISS. CONST. art. III, § 14. Casino interests could argue that the state constitution protects against "laws impairing the obligation of contracts." MISS. CONST. art. III, § 16. However, the Mississippi Supreme Court has noted that an exercise of police power, where beneficial to the public, may impose certain limitations upon the right of contract. *State v. J.J. Newman Lumber Co.*, 59 So. 923, 926-27 (Miss. 1912), *aff'd*, 60 So. 215 (Miss. 1913).

the court stated that the "residual power of review" in administrative law should remain "in the judiciary."²⁴²

However, the Mississippi Supreme Court has been as equally emphatic in referring to state constitutional law in stating that "[a] right of appeal is statutory."²⁴³ The court asserted that "[a] circuit court has no authority to judicially create a right of appeal from an administrative agency in the absence of clear statutory authority"²⁴⁴

²⁴² Mississippi Pub. Serv. Comm'n v. Mississippi Power & Light Co., 593 So. 2d 997, 1000 (Miss. 1991). Casino proponents have argued that the judiciary must maintain a system of checks and balances over the decisions of the state gaming commission by allowing judicial review of licensing decisions. Rebuttal Brief of the Appellants at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257). Judicial review, according to these proponents, ensures that the government will not be in the "business . . . of setting up all powerful commissions in the executive branch that can operate contrary to the provisions of the statutes and their own regulations and not be reviewed by a Court." *Id.* Since case law demonstrates that there is no right to review licensing decisions, the checks and balances argument may be the most powerful, although it has failed to persuade the court on at least one occasion. *Bickham v. Department of Mental Health*, 592 So. 2d 96, 97 (Miss. 1991). However, *Bickham* may be distinguishable from the present situation because that court did not seal off a final review of an administrative decision, but merely any interlocutory appeals. *Id.* at 98.

In a related point, casino proponents argue that the state's reliance on Nevada case law barring judicial review of final gaming commission decisions is inapplicable to an interlocutory decision by the Commission. Rebuttal Brief of the Appellants at 2, *Ladner* (No. 11,257). However, *Bickham's* barring of interlocutory appeals from an administrative decision would seem to weaken this argument. Observers have concluded that the right to judicial review can override legislative mandates that a certain administrative decision is final, although these instances are rare. 2 AM. JUR. 2D *Administrative Law* § 565 (1994). Recently, the United States Supreme Court declared that Congress may preclude judicial review of constitutional claims under a "heightened showing" of clear intent. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

²⁴³ *Bickham*, 592 So. 2d at 97.

²⁴⁴ *Id.* at 98. The court characterized any circuit court decisions on appeal without appropriate statutory authority as "nullities." *Id.* Other authority may seem to counter the *Bickham* opinion, since the court stated in *Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss.), *cert. denied*, 396 U.S. 940 (1969), that parties could make a limited appeal from an administrative agency's decision. However, the Legislature had authorized this appeal through § 9083 of the 1968 Mississippi Code. *Id.* This section provided for a limited review of the Tax Commission's revocation of a permit which exempted entities from an entertainment tax. MISS. CODE ANN. § 27-11-49 (1972) (repealed

The Takings Clause of the United States Constitution also offers no support for a right to a casino license. Recently, in *Lucas v. South Carolina Coastal Council*,²⁴⁵ the United States Supreme Court determined that state action could constitute a taking where the state's regulations deny "all economically beneficial or productive use of [the] land."²⁴⁶ One could argue that a regulation giving the state's gaming commission unfettered discretion to deny a casino license would preclude a productive use of the land. There are two problems with this argument. First, the wording of the *Lucas* decision, if read restrictively, would bar any challenge unless the state's regulation barred all productive use of the land.²⁴⁷ The use of waterfront land for a casino may be the highest and best use of the land, but it may not be the only productive use available.

Second, and more importantly, several cases subordinate the use of land, even by individuals on their own property, when a public interest arises sufficient to trigger the proper use of police power by the state.²⁴⁸ This argument is particu-

1989). Federal courts also prohibit judicial review of "[administrative] adjudications made in conformity with policy decisions," if that statute allows review of matters of constitutional proportion. *Benton v. United States*, 960 F.2d 19, 22 (5th Cir. 1992).

²⁴⁵ 112 S. Ct. 2886 (1992).

²⁴⁶ *Lucas*, 112 S. Ct. at 2893. The other state action constituting a taking is a regulation which would require the property owner to face "a physical 'invasion' of his property." *Id.* Casino proponents argue that under the Fifth Amendment, the state may only take property after proper due process with just compensation for their loss. Rebuttal Brief of the Appellants at 6, *Ladner* (No. 11,257); Brief of Appellants at 17-18, *Board of Educ.* (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994); (No. A-2401-94-00211); Rebuttal Brief of Appellants at 14, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Sept. 19, 1994) (No. A-2401-94-00211).

²⁴⁷ *Lucas*, 112 S. Ct. at 2894. The Court realized the problem of determining the extent of how burdensome the land regulation must be before it constituted a taking. *Id.* at 2894 n.7. Although the Court avoided solving this problem as described in footnote seven of the opinion, it did use the standard of denying an owner "economically viable use of his land." *Id.* at 2894.

²⁴⁸ *Walker v. Board of County Comm'rs*, 116 A.2d 393, 401 (Md.), cert. denied, 350 U.S. 902 (1955). The *Walker* court clearly stated that any use of property "injurious to the health, comfort, safety, and welfare of society" may be regulated or prohibited, even with a loss to the individual property owner. *Id.* Mississippi courts have allowed the state similar powers over individual rights where that

larly persuasive when considering other state court pronouncements on the absolute necessity of regulation to ensure the public safety regarding the casino industry.²⁴⁹ Nevada courts have affirmed the state's ability to regulate these industries through licensing, given the threat to the public well-being.²⁵⁰ As a result, there is little question that the state may act without concern that its actions possibly constitute a taking, given the almost unique nature of the casino industry.

It is clear that Mississippi case law defers to the Legislature in determining judicial review of administrative agency decisions. As a result, the Gaming Control Act's provisions precluding judicial review of licensing decisions will support the argument that neither a property interest in the license nor a right of appeal itself accrues to a prospective casino interest.

3. *Mississippi Administrative Law: Does This Area Provide Support for a Right?*

The Mississippi Administrative Procedures Act provides little assistance little in establishing a right to a casino license. The APA does require agencies to give notice and a fair hearing to parties facing "revocation, suspension, annulment or withdrawal" of their license.²⁵¹ However, that same act calls these

individual's exercise of his right could affect the public. *See, e.g.,* Dorsey v. Murphy, 194 So. 603, 606 (Miss. 1940).

²⁴⁹ *See, e.g., In re Martin*, 447 A.2d 1290, 1302 (N.J. 1982). In this case, the New Jersey Supreme Court ruled that "the Legislature has substantial power to regulate non-essential, dangerous and sensitive industries to protect the public safety and welfare." *Id.* (citations omitted).

²⁵⁰ *State v. Rosenthal*, 559 P.2d 830, 833 (Nev. 1977). The *Rosenthal* court classified casino gaming with sellers of liquor as industries potentially harmful to the public. *Id.* As such, the court asserted that the state could "regulate or suppress it without interfering" with the casino applicant's rights. *Id.* (citations omitted). Another Nevada court termed casino operations in a "unique setting" requiring strict regulation in order to protect the public. *State v. Glusman*, 651 P.2d 639, 643 (Nev. 1982). Florida courts have affirmed the idea that a state may exercise greater police power and control over gaming. *See, e.g., Summersport Enters. v. Pari-Mutuel Comm'n of Dep't of Business Regulation*, 493 So. 2d 1085, 1088-89 (Fla. Dist. Ct. App. 1986).

²⁵¹ MISS. CODE ANN. § 25-43-13 (1991). The Act also allows an agency to suspend such a license summarily in case of public health, safety or welfare being in

parties "licensees," expressly limiting the provision for notice and a hearing to those parties who already possess a license.²⁵²

As for general administrative law, the Mississippi Supreme Court is clear in establishing a right to review, based in general upon an arbitrary and capricious standard.²⁵³ However, the Legislature has expressly diminished that review under the Mississippi Gaming Control Act.²⁵⁴ A Mississippi circuit court has upheld the Gaming Commission's determination of on site locations under a standard of abuse of discretion.²⁵⁵ However, the Mississippi Supreme Court in *Bickham v. Department of*

danger. *Id.*

²⁵² MISS. CODE ANN. § 25-43-13 (1991) Furthermore, the Code restricts the usage of the APA to situations in which there is no conflict between the APA and other statutes. MISS. CODE ANN. § 25-43-15 (1991) The precise language of the Mississippi Gaming Control Act relating to casino licensing would certainly conflict with the APA, resulting in the Mississippi Gaming Control Act being upheld against the APA. In a related point, New York has held that gaming commissions need no greater proof for revocation of a gaming license than for the denial of the initial application for that license. *In re Sport & Fun, Inc. v. Ratner*, 440 N.Y.S.2d 291, 292 (N.Y. App. Div. 1981).

²⁵³ *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 317 (Miss. 1992), *cert. denied*, 113 S. Ct. 976 (1993). The court stated reversal of the administrative board's decision is available when a decision goes "(1) beyond the Board's legal power, (2) violates some constitutional right of the complaining party, (3) is arbitrary or capricious, or (4) is not supported by substantial evidence." *Id.* The court found that these standards ensured that no review by a court of an administrative decision could be *de novo*. *Id.*

²⁵⁴ MISS. CODE ANN. § 75-76-125(3) (1991) It is arguable whether the Legislature has diminished the standard significantly. The gaming statute only allows reversal of the gaming commission's decision if it is "[u]nsupported by any evidence." *Id.* In contrast, *McGowan* permits reversal of an administrative decision if it "is not supported by "substantial evidence." *McGowan*, 604 So. 2d at 317. On the other hand, both the statute and the decision employ the arbitrary and capricious standard. Through the use of the word "or" with these factors, both *McGowan* and § 75-76-125(3) allow a court to reverse an administrative decision simply if the decision was arbitrary and capricious, without reference to the other factors.

²⁵⁵ Order at 2-3, *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n* (Cir. Ct. Hinds County, Miss., Feb. 3, 1994) (No. 93-77-269). Judge L. Breland Hilburn held that the Commission's decision did not constitute a "showing of clear abuse" even though its decision was counter to an Attorney General's Opinion on the proper siting of casinos under the Gaming Control Act. *Id.*

*Mental Health*²⁵⁶ expressly denied the ability of a circuit court to create a common-law right to appeal an agency decision in the absence of statutory authority granting such a right.²⁵⁷ Thus, the *Bickham* pronouncement seemingly forecloses a right to judicial review due to the Gaming Control Act expressly denies a right to review the Commission's denial of a license.²⁵⁸ However, there is a general grant of judicial review under the Gaming Control Act²⁵⁹ which casino applicants could use to argue that the Gaming Control Act does establish a right of review, not only for current license holders, but license applicants as well.²⁶⁰ Section 75-76-121 expressly allows judicial review for "[a]ny person aggrieved by a final decision or order of the commission."²⁶¹ Indeed, two circuit courts have relied on that statute to review and overturn Commission siting decisions.²⁶²

It is evident that the current state of the law runs against the grant of a right to judicial review, because of the Gaming

²⁵⁶ 592 So. 2d 96 (Miss. 1991).

²⁵⁷ *Bickham*, 592 So. 2d at 97.

²⁵⁸ See MISS. CODE ANN. § 75-76-127(2) (1991) (stating "[j]udicial review is not available for actions, decisions and orders of the commission relating to the denial of a license or to limited or conditional licenses").

²⁵⁹ See MISS. CODE ANN. § 75-76-121 (1991) (outlining right of judicial review in circuit court of Commission's final decision).

²⁶⁰ See Rebuttal Brief of the Appellants at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257); Brief of Appellants at 1-2, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994) (No. A-2401-94-00211); Rebuttal Brief of Appellants at 4-5, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Sept. 19, 1994) (No. A-2401-94-00211).

²⁶¹ MISS. CODE ANN. § 75-76-121(1) (1991).

²⁶² See Order, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Feb. 7, 1994) (No. 11,257) (overturning unfavorable Commission siting decision, finding it arbitrary and capricious and in excess of Commission's statutory authority); Findings of Fact and Conclusions of Law, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Dec. 30, 1994) (No. A-2401-94-00211) (finding that § 75-76-121 authorizes appeal of unfavorable Commission siting decision, and that Commission's decision is violative of applicable statutes, in excess of statutory authority, unsupported by any credible evidence, arbitrary and capricious, not in accordance with applicable law, and not supported by substantial evidence).

Control Act's stance against review,²⁶³ the Mississippi Gaming Commission's reliance on Nevada gaming statutes, and its implicit reliance on Nevada case law in this area.²⁶⁴ However, the various bases of the Nevada courts' decisions are distinguishable from the grounds our courts may use, which could lead to a different result on the question of rights to review Commission decisions in Mississippi.²⁶⁵ As for administrative law, *Bickham* should control in barring a right to review circuit courts' decisions to the contrary.²⁶⁶

Casino operators may use section 75-76-121 of the Mississippi Code to establish a broader right of review, despite its conflict with another statutory provision denying such relief.²⁶⁷ Alternatively, casino interests may attempt an equitable argument requiring checks and balances between administrative and judicial entities in order to sway the judiciary toward recognizing a right of judicial review.²⁶⁸ As a result, the conflicting arguments, now both supported by limited precedent and statutory grounds, make this question ripe for review.

B. Can Third Parties Appeal a Grant of a Gaming License?

Another important question arises when the Gaming Commission *grants* a gaming license. Many parties are likely to be upset at the decision, including adjoining landowners, local industries, and existing gaming operations facing competition. Three bodies of law are involved in a determination of this question: 1) the statutory law on the subject; 2) case law concerning the question of standing for adjacent landowners with

²⁶³ See *supra* note 228 and accompanying text.

²⁶⁴ See *supra* notes 229-30 and accompanying text.

²⁶⁵ See *supra* notes 241-44 and accompanying text.

²⁶⁶ See *supra* notes 256-57 and accompanying text.

²⁶⁷ See *supra* note 260 and accompanying text.

²⁶⁸ Rebuttal Brief of the Appellants at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257). This argument has a strong equitable component of asserting the judiciary as a protector of citizens against the unfettered power of the executive branch's agencies. *Id.*

general economic injury; and 3) case law concerning standing for gaming operators to assert economic injury through competition.

1. Mississippi Statutory Law

Mississippi law is silent on the issue of judicial review of a Gaming Commission decision to grant a casino license.²⁶⁹ Proponents of a general right of appeal in licensing decisions argue that the Gaming Control Act²⁷⁰ grants a right of appeal for any final decision of the state Gaming Commission.²⁷¹ However, the Commission contends that the Gaming Control Act expressly denies a right to appeal. In addition, Nevada courts have determined that its counterpart to the Mississippi statute applies only to disciplinary actions.²⁷² Moreover, the *Bickham* decision seems to require that an aggrieved party's right of appeal from Commission decisions granting gaming licenses must be expressly granted.²⁷³ The lack of such an express grant in the Gaming Control Act supports the argument that

²⁶⁹ Edds, *supra* note 229, at 1-2. The Attorney General's office has determined that "[a]ppeals from final decisions of the Mississippi Gaming Commission can be perfected only in [five] circumstances—disciplinary actions, patron disputes, work permit revocations, exclusion or ejection of a person from a gaming establishment, and state tax assessments." *Id.* at 1 (footnotes omitted).

²⁷⁰ See MISS. CODE ANN. § 75-76-121(1) (1991).

²⁷¹ See Rebuttal Brief of the Appellants at 3, *Ladner* (No. 11,257); Brief of Appellants at 1, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Aug. 15, 1994) (No. A-2401-94-00211); Rebuttal Brief of Appellants at 4-5, *Board of Educ. v. Mississippi Gaming Comm'n* (Cir. Ct. of Harrison County, Miss., Sept. 19, 1994) (No. A-2401-94-00211) (citing MISS. CODE ANN. § 75-76-121(1) (1991)).

²⁷² *State v. Rosenthal*, 559 P.2d 830, 834 (Nev. 1977). The Nevada Supreme Court explicitly stated that the Nevada statute concerning a right of appeal, Nevada Revised Statutes Annotated section 463.312, was placed in the disciplinary section for a reason. *Id.* This section granted a right of review only to existing casino operations facing the revocation of their license. *Id.* As a result of its placement, aggrieved license applicants did not have a general right of review against the state gaming commission's denial of a license. *Id.*

²⁷³ *Bickham v. Department of Mental Health*, 592 So. 2d 96, 97 (Miss. 1991). The court was clear in declaring that the judiciary had no business creating rights of appeal from administrative decisions out of common law where they were not expressly provided for by the legislature. *Id.* at 98.

competitors cannot use section 75-76-121 of the Mississippi Code to appeal a casino licensing, assuming strict application of the statutes.

2. Economic Injury as Standing - Could Economic Loss Create a Right to Appeal?

Adjacent property owners could assert state action in licensing,²⁷⁴ and further argue such licensing violated the Takings Clause of the United States Constitution in that the grant of a casino license could arguably deprive the landowner of the beneficial enjoyment of the land.²⁷⁵ In a landmark Pennsylvania case, the court permitted aggrieved residents a right to appeal the Pennsylvania Gaming Commission's grant of an off-track-betting facility license, despite the lack of such a provision in that state's gaming statute.²⁷⁶

Aggrieved competitors could assert a federal claim, demonstrating economic injury for standing and a due process property right to earn a living, to argue that the state cannot take these rights without compensation.²⁷⁷ Proponents would argue

²⁷⁴ *Dixon v. Love*, 431 U.S. 105, 112 (1977). The Court held that a suspension of an existing license constituted state action determining important interests of the licensees. *Id.* Likewise, the grant of a license should similarly involve state action.

²⁷⁵ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). Depriving the owner of any "economically viable use of his land" constitutes such a taking. *Id.* (citations omitted)

Casinos attempting to appeal in a representative capacity for affected landowners would meet the same hurdles those parties would face, plus the additional requirements of being able to show a close relationship to the affected parties and an ability to represent those parties' interests. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). In addition, casinos would not possess standing through asserting these third parties' interests alone. *Warth v. Seldin*, 422 U.S. 490, 509-10 (1975).

²⁷⁶ *Cashdollar v. State Horse Racing Comm'n*, 600 A.2d 646, 649 (Pa. Commw. Ct. 1991). The court found it "anomalous" for the legislature to require the state's gaming commission to consider the public's interest in the location of that facility, without granting the public a right to argue that the commission failed to properly consider its interests. *Id.* The court expressly noted its dismay that the legislature failed to grant the right of appeal to the public, but dismissed that problem by asserting its own right to determine standing, even if it meant overruling the legislature's implied intent in this regard. *Id.* at 649 n.5.

²⁷⁷ Appeals rights advocates assert that constitutional rights serve as a check

that economic injury through competition has been successful in conferring standing.²⁷⁸ Third parties could also argue that the Massachusetts Supreme Court did allow standing on economic grounds for gaming, but only to the extent that it impacted on the quality of the service being extended by established casino entities.²⁷⁹

In response, the Commission could assert that as to standing, a plaintiff must demonstrate how the Legislature intended to limit competition as an objective of the legislation, so as to allow the aggrieved party to bring an action in furtherance of the Legislature's objectives.²⁸⁰ In addition, other state courts interpreting gaming law have held that "threatened economic loss to an existing licensee does not of itself confer standing to object" to a license being granted to a competitor.²⁸¹ One such

on the power of the Gaming Commission. Rebuttal Brief of the Appellants at 6, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257).

²⁷⁸ *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 154 (1971). *Camp* expanded standing to include people with both a legal interest, or a potential injury in fact, if their interests are within the zone of interests intended to be protected by the statute. *Id.* One limitation of showing such an injury is that the losses must be "real and immediate," and not hypothetical. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); see also *Three Rivers Home Health Servs., Inc. v. Healthmaster, Inc.*, 388 S.E.2d 7, 8 (Ga. Ct. App. 1989) (affirming standing of business competitors to sue). Practitioners have recommended that petitioners must demonstrate to the court that review is appropriate, minimizing the concern that petitioner's interests are "tangential" to the legal question. *Standing to Obtain Review*, BNA Administrative Practice Manual (BNA) No. 8 at § 151:1301 (July 31, 1988).

²⁷⁹ *Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n*, 184 N.E.2d 38, 39 (Mass. 1962). The court stated economic injury was sufficient to confer standing on a competitor, on the sole basis that it affected the quality of services the competitor could provide after its injury. *Id.* On the merits, the court found that the state's action did not injure the ability of Bay State to provide quality racing. *Id.* As a result, the court denied standing to Bay State. *Id.* at 40.

²⁸⁰ *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). The Court applied the "zone of interest" test in determining whether Congress anticipated and approved the ability of competitors to sue on the basis of competition as a goal of the legislation. *Id.*

²⁸¹ *Our Lady of Good Counsel Roman Catholic Church & School v. Ball*, 356 N.Y.S.2d 641, 645 (N.Y. App. Div. 1974). In accordance with that policy, the New York court only acknowledged such a cause of action if the petitioners could dem-

case asserted that legislatures could regulate gaming either to sponsor competition or to establish monopolies if they wished, because no entity had an inherent right to gamble, as gaming was likely a detriment to the public.²⁸²

Additionally, the Commission could counter that even if standing to sue on economic grounds were present, aggrieved competitors who asserted constitutional grounds after showing standing to sue would then have to demonstrate a protected right under the Gaming Control Act to earn a living as a casino operator.²⁸³ The Commission can demonstrate that the legislative intent under the Gaming Control Act requires the licensing procedure sponsor, and not limit, competition.²⁸⁴ In support of this premise, the Commission could argue that New Jersey courts, for example, have upheld anti-monopoly regulations in support of sponsoring competition, as a means of preventing "economic domination" by a gaming entity.²⁸⁵ Alterna-

onstrate that legislative intent was clear in restricting competition. *Id.* at 646. Because the petitioner could show such an intent, the court acknowledged petitioner's standing to sue. *Id.*

²⁸² *Rodriguez v. Jones*, 64 So. 2d 278, 280 (Fla. 1953) (en banc). It is seemingly clear that if the courts can bar competition to the point of establishing a monopoly, thus ensuring potential competitors make no profit at all, it can equally well admit competition, which would only potentially reduce profits.

²⁸³ *Doe v. Gates*, 981 F.2d 1316, 1320 (D.C. Cir.), cert. denied, 114 S. Ct. 337 (1993). The *Gates* court reaffirmed the principle that the Constitution does not create a property interest in employment, as a means of making a living. *Id.* Instead, plaintiffs must demonstrate an "independent source" of this right, from "statutes, regulations, ordinances," or other similar authority. *Id.*

²⁸⁴ See MISS. CODE ANN. § 75-76-3(3)(a) (1991). Inasmuch as casino regulations do screen out applicants limiting competition, the Legislature justified these rules as protecting the "public safety" and "general welfare" of the state's citizens. MISS. CODE ANN. § 75-76-3(3)(c) (1991). Mississippi's statement on competition derives from the goals stated in Nevada's Gaming Control Act, which uses the same language. See NEV. REV. STAT. ANN. § 463.0129 (1994). New Jersey specifically states in its Casino Control Act that "competition in the casino operations in Atlantic City is desirable." N.J. STAT. ANN. § 5:12-1(b)(12) (West Supp. 1993).

²⁸⁵ *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 426 A.2d 1000, 1003 (N.J. 1981). Appellants argued that the commission, in fostering competition, had the right to regulate only when the situation required anti-trust remedies in order to prevent predatory practices. *Id.* The court rejected this argument by broadening the power of the commission to foster competition through action and regulation whenever "economic domination" by a gaming entity arose, such as when an entity manufactured slot machines and operated casinos. *Id.*

tively, casino interests could attempt an equitable argument requiring checks and balances between administrative and judicial entities in order to sway the judiciary toward recognizing a right of judicial review.²⁸⁶ However, given the deference shown by the Mississippi Supreme Court concerning the Legislature's determination of rights of appeal from administrative agencies, this argument is unlikely to sway the court.²⁸⁷

C. Can Interlocutory Judicial Review Be Sought from a Gaming Commission Decision?

The Mississippi Gaming Commission makes a preliminary finding of site suitability before the final decision on granting or rejecting a license.²⁸⁸ Prospective casino operators would support an ability to appeal the Commission's site suitability decision as a means of redressing an unfavorable decision of the Commission before its final decision on licensing. However, there is no statute supporting an interlocutory appeal in the Gaming Control Act.²⁸⁹ Therefore, this question must be answered under Mississippi's administrative case law.

The Mississippi Supreme Court has disapproved of appeals from an administrative agency before that agency has completed its function.²⁹⁰ The rationale behind the decision lies in the

²⁸⁶ See Rebuttal Brief of the Appellants at 3, *Ladner v. Mississippi Gaming Comm'n* (Cir. Ct. of Hancock County, Miss., Sept. 25, 1992) (No. 11,257).

²⁸⁷ *Bickham v. Department of Mental Health*, 592 So. 2d 96, 97 (Miss. 1991). The court stated that rights of appeal from administrative decisions derive solely from statutory authority. *Id.*

²⁸⁸ MISSISSIPPI GAMING COMMISSION PROCEDURAL FACT SHEET FOR GAMING LICENSE (October 21, 1993). This site suitability and development approval consists of several elements, including input from a number of administrative agencies and the public at large. *Id.*

²⁸⁹ *Edds*, *supra* note 229, at 1. Currently, "appeals from final decisions" are available only under certain limited circumstances. *Id.* Even under the statute most likely to allow a general appeal, the Gaming Commission's decision must be final. MISS. CODE ANN. § 75-76-121(1) (1972) ("[a]ny person aggrieved by a *final* decision. . . ." (emphasis added)).

²⁹⁰ *Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969). In this case, the court was dealing with an agreement between the State Tax Commission and the fair to have the matter determined

limited nature of judicial review for administrative decisions in general.²⁹¹ Recently, in *Bickham*, the Mississippi Supreme Court appeared to widen this principle to include all administrative agencies by stating that "[a] right of appeal is statutory."²⁹² Further, the court held that "[a] circuit court has no authority to judicially create a right of appeal from an administrative agency in the absence of clear statutory authority therefor."²⁹³ Consequently, in the face of *Bickham* coupled with the absence of a statutory authority in the Gaming Control Act, the likelihood of obtaining an interlocutory appeal from a decision of the Gaming Commission appears dim.

However, in a 1994 Memorandum Opinion the Mississippi Gaming Commission clouded the issue by expressly stating that its order approving a gaming site is "a final order insofar as site approval is concerned."²⁹⁴ Furthermore, the Commission, along with the remaining parties in the Pine Hills litigation, agreed that its decision granting site approval (or a license) was reviewable under the Gaming Control Act and proceeded to litigate the matter without arguing the issue of judicial review.²⁹⁵

de novo after the Commission's decision. *Id.* The court struck this agreement down as contrary to the principle of limited judicial review of administrative agency decisions. *Id.* at 666-67. However, the court announced the principle against interlocutory decisions in reaching its conclusion. *Id.*

²⁹¹ *Id.* The court determined that limited review was necessary to maintain checks and balances against the judiciary, as well as the other branches. *Id.* at 666. Interlocutory appeals can also cause severe disruption to agency proceedings. Interlocutory Appeals, BNA Administrative Practice Manual (BNA) No. 9, at § 111:2601 (July 31, 1989).

²⁹² *Bickham v. Department of Mental Health*, 592 So. 2d 96, 97 (Miss. 1991). The court cited cases in support of this principle which extended beyond those of workers' compensation. *Id.* Since the applicable statutes did not explicitly grant a right to interlocutory appeals, the court dismissed the workers' compensation cases before it for lack of jurisdiction and remanded the causes to the Workers' Compensation Commission. *Id.*

²⁹³ *Id.* at 98 (emphasis added). In addition, the Mississippi Supreme Court overruled an earlier decision which held that a circuit court could grant an interlocutory appeal from an administrative agency under "certain circumstances." *Id.* (overruling *Sonford Products Corp. v. Freels*, 495 So. 2d 468 (Miss. 1986)).

²⁹⁴ Memorandum Opinion, *supra* note 53, at 2. The Commission intended that its Memorandum Opinion "furnish general guidance to other present and future applicants with respect to the site evaluation processes utilized by the Commission." *Id.* at 1.

²⁹⁵ Brief of Appellees at 14-15, *Mississippi Casino Operators Ass'n v. Missis-*

Gaming law is still in its infancy.²⁹⁶ As such, there is limited precedent on which to base a firm conclusion, notwithstanding Nevada case law. However, it is clear that Nevada gaming case law and Mississippi administrative case law deny the existence of a right to a casino license, as well as a right of appeal outside any statutory grant. Beside isolated reliance on section 75-76-121(1) of the Mississippi Code, any such grant must derive from the court as an equitable principle. Likewise, appeals from license grants, whether interlocutory or not, will have to rely on the Mississippi Gaming Commission's stated policy permitting appeals, or be confined to equitable arguments or discussion as to how the Commission is causing economic injury by its granting of too many licenses. It appears that the Commission can support its actions as being within the scope of its authority through use of the legislative intent within the Gaming Control Act, as well as through the streamlining of licensing procedures. However, given the amount of support available for both sides on any of these issues, these questions are still open for review.

VI. CONCLUSION

Since its arrival in 1992, gaming as an industry has already become a major, and rapidly expanding, presence on the Gulf Coast and in Mississippi River counties within Mississippi.²⁹⁷ However, accompanying the local economic boom is concern by property owners and existing businesses about a loss in the

issippi Gaming Comm'n (Miss. July 8, 1994) (No. 94-TS-0235).

²⁹⁶ Edds, *supra* note 229, at 2. The Mississippi Attorney General's Office cautions that as a result of its recent arrival in Mississippi, gaming law is still evolving and awaits interpretation by the Mississippi Supreme Court. *Id.*

²⁹⁷ Mississippi Gaming Commission Statistics (Dec. 31, 1994). As of December 31, 1994, there were 13 casinos operating on the Coast, with 4 additional casinos licensed but not yet operating, 1 casino licensed but now closed and one pending casino application. In addition, on that date 17 casinos were operating in the Mississippi River counties, with 3 additional casinos licensed but not yet operating, 4 casinos licensed but now closed, and 3 pending casino applications. *Id.* The positive impact of the casinos are apparent in the increases in sales, tax revenues, passenger arrivals at Biloxi-Gulfport Regional Airport, and a two percent drop in Harrison County's unemployment rate from 1992 to 1993. Lee Ragland, *Numbers Indicate Impact of Casinos on Mississippi Gulf Coast*, CLARION LEDGER (Jackson, Miss.), Nov. 11, 1993, at B1.

more sedate and settled life which casino business may disrupt.²⁹⁸ As casino interests appear ready to expand the industry into new areas of Mississippi, the regulation of gaming has become an area of interest not only to the Coast and River counties, but to the entire state as well.²⁹⁹

The state of the law in Mississippi as it pertains to the siting of dockside casino vessels, as well as judicial review of Gaming Commission decisions regarding the same, is presently uncertain. The inherent ambiguity in certain portions of the Gaming Control Act, their inconsistent interpretation by the Attorney General's Office,³⁰⁰ and the Legislature's inaction subsequent to the Act's passage in 1990 combine to offer little guidance to prospective casino interests investigating Mississippi as a potential location for an investment of their capital. Through application of the Gaming Control Act and the promulgation of interpretive regulations, the Gaming Commission, in concert with the Attorney General's Office, has successfully forged some order out of chaos. The Supreme Court of Mississippi now stands poised to resolve several legal issues which remain.

ADDENDUM

After this book went to print, the Mississippi Supreme Court decided *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n*, 1995 WL 215939 (Miss.). The court held that the Commission cannot lawfully grant a license which approves construction of a gaming vessel in an artificial inlet. This case should be read in conjunction with the previous article.

²⁹⁸ Sharon Stallworth, *Some Proposed Coast Casino Sites Draw Opposition*, CLARION LEDGER (Jackson, Miss.), Nov. 18, 1993, at B1. The outcry from concerned individuals does not merely derive from homeowners, but sportsmen as well. *Id.*

²⁹⁹ Grace Simmons, *Study Deals Job Jackpot to Jackson*, CLARION LEDGER (Jackson, Miss.), Jan. 12, 1994, at A1. Proponents argue the proposed casino in Jackson could create up to 2700 new jobs and \$7.2 million dollars in state tax revenues. *Id.*

³⁰⁰ This inconsistency is likely the result of the Attorney General's Office being the agency required to make sense of the Gaming Control Act's ambiguities and to effectuate the Act's purpose. In this regard the Attorney General's Office has been the agency which has nurtured the growth of Mississippi's gaming industry.

FLOATING CASINOS, PERSONAL INJURY AND DEATH CLAIMS, AND ADMIRALTY JURISDICTION

Richard J. McLaughlin*

I. INTRODUCTION

Since the first gaming vessel went into operation about four years ago, the riverboat casino industry in the United States has experienced phenomenal growth. Fifty-eight gaming vessels¹ are currently in operation.² In 1993, these vessels generated \$27.1 billion in gross wagering, a 265% in-

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¹ This article uses the terms "gaming vessel," "riverboat casino," or "floating casino" when referring to any floating structure on which gaming takes place. These generic references have been employed to assist readers and are not meant to imply that all of these floating structures should be deemed "vessels" for purposes of classification under maritime law. See *infra* notes 38-88, 215-306 and accompanying text.

² The "Big Picture" Revisited, RIVERBOAT GAMING REPORT, (Pearson Publishing Co., Inc., Metairie, LA) Aug. 1994, at 1 [hereinafter RIVERBOAT GAMING REPORT]. The riverboat gaming industry is changing very rapidly. *Id.* Over 40 additional gaming vessels are either complete and not delivered, under construction, or in the definite planning stages. *Id.* at 5. For example, eight new vessels are due to enter the market in Missouri and nine in Louisiana by the beginning of 1995. *Id.* at 7, 10. In addition, existing vessels may move to new locations, while others will go out of business. See, e.g., Lee Ragland, *Belle First Casino in State to go Bankrupt, Won't be Last*, CLARION-LEDGER (Jackson, Miss.), Sept. 19, 1994, at A1 (noting gaming company's bankruptcy filing).

crease from the previous year.³ Casino gaming on floating structures is legal in some form in six states—Illinois,⁴ Indiana,⁵ Iowa,⁶ Louisiana,⁷ Mississippi,⁸ and Missouri.⁹ Riverboat gaming bills have also been proposed in at least fifteen other states.¹⁰

The legalization of riverboat casinos has brought significant change to the economic, natural, and cultural environments of these states.¹¹ Nowhere has this impact been felt more intensely than in the State of Mississippi.¹² By January 1995, 25,000 people in Mississippi were directly employed by gaming vessels.¹³ Along the Gulf Coast of Mississippi

³ Eugene Martin Christiansen, *Gross Annual Wager*, INT'L GAMING & WAGERING BUS., Aug. 5, 1994, at 14, 16. "Gross wager" means the gross amount wagered at any form of gambling, including cash equivalents such as chips, tokens or plaques. *Id.* at 14.

⁴ ILL. ANN. STAT. ch. 230, para. 10/1-10/23 (Smith-Hurd 1993).

⁵ IND. CODE ANN. §§ 4-33-1-1 to -15-4 (Burns Supp. 1994).

⁶ IOWA CODE ANN. §§ 99F.1-99F.18 (West Supp. 1994).

⁷ LA. REV. STAT. ANN. §§ 4:501-562 (West Supp. 1995).

⁸ MISS. CODE ANN. §§ 75-76-1 to -281 (1991).

⁹ MO. ANN. STAT. §§ 313.800-.850 (Vernon 1994).

¹⁰ These states include Alabama, Connecticut, Florida, Georgia, Kansas, Maryland, Massachusetts, Minnesota, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. Brian D. Wallace, *An Overview of Issues Pertaining to Dockside and Riverboat Gambling* 1 (unpublished manuscript, on file with author). See Victor J. Franckiewicz, Jr., Comment, *The States Ante Up: An Analysis of Casino Gaming Statutes*, 38 LOY. L. REV. 1123, 1126-34 (1993) (analyzing statutes governing legalized gambling); James R. Swanson, *Summary of Riverboat Gaming Statutes*, Presented at the Gaming Seminar, Tulane Law School 1 (Sept. 8-9, 1994) (transcript on file with author) (analyzing existing and proposed legislation in numerous states).

¹¹ For a discussion of the environmental impact of the casino gaming industry in Mississippi, see Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 354-60 (1995), Jeffrey P. Reynolds & Daniel L. Singletary, *Environmental Concerns and the Impact of Wetlands Regulations on Mississippi's Gaming Industry*, 64 MISS. L.J. 517 (1995); see also Gerri Hirschey, *Gambling Nation*, N.Y. TIMES, July 17, 1994, § 6 (Magazine), at 36 (discussing overall impact of casinos on communities).

¹² For an interesting commentary on the environmental, economic, and social effects that casino gaming has had in Mississippi, see Dave Burrage & Benedict Posadas, *Dockside Gaming: Coastal Mississippi's Newest Industry*, FORCE FIVE, (Miss.-Ala. Sea Grant Consortium, Ocean Springs, MS), Fall 1994, at 2.

¹³ This represents employment on 30 gaming vessels and adjoining facilities. Mississippi Gaming Commission Report, Jan. 1995 (copy on file with author).

alone,¹⁴ casinos are attracting approximately 50,000 visitors a day.¹⁵ Over one billion dollars have already been invested in new construction along the coast, and some estimates suggest an additional three to five billion dollars will be invested during the next several years.¹⁶ More than 20,000 new residents have moved to the Mississippi Gulf Coast since 1990.¹⁷

Although Mississippi currently has more gaming vessels than all other states combined,¹⁸ the economic impact in other states is also considerable. Gaming vessels located outside of Mississippi generated a total casino win of \$171 million in July 1994, compared to about \$144 million in Mississippi during the same time period.¹⁹ Ten vessels outside of Mississippi had at least 200,000 visitors during the month of July 1994,²⁰ with the total number of patrons entering gaming vessels outside of Mississippi during this month totaling 4,234,000.²¹

An obvious effect of the unprecedented growth of the riverboat casino industry is a staggering increase in the number of people who either work aboard or visit floating struc-

¹⁴ As of August 1994, 14 gaming vessels were located along the Mississippi Gulf Coast, with an additional 17 located along the Mississippi River. See *infra* Figure I.

¹⁵ COMMUNITY ASSOCIATES, CASINO VESSEL HURRICANE EVACUATION ALTERNATIVES, HARRISON COUNTY MISSISSIPPI 2 (1994).

¹⁶ *Id.*

¹⁷ *Id.* Additionally, the gaming industry has created over 15,000 new jobs in Mississippi since 1991. *Id.*

¹⁸ See *infra* Figure I.

¹⁹ RIVERBOAT GAMING REPORT, *supra* note 2, at 8-9. "Casino win" is synonymous with "gross gambling revenue," and means the total amount wagered less pay-outs, prizes or winnings returned to players. Christiansen, *supra* note 3, at 14.

²⁰ RIVERBOAT GAMING REPORT, *supra* note 2, at 6. These include: *Casino Queen*, East St. Louis, Ill. (413,000); *Isle of Capri*, Bossier City, La. (377,000); *Empress*, Joliet, Ill. (315,000); *Harrah's*, Joliet, Ill. (267,000); *Alton Belle*, Alton, Ill. (256,772); *Hollywood*, Aurora, Ill. (252,000); *Queen of N.O.*, New Orleans, La. (232,000); *Showboat Star*, New Orleans, La. (211,000); *Par-A-Dice*, East Peoria, Ill. (207,000); and *Harrah's*, Shreveport, La. (202,000). *Id.*

²¹ *Id.* at 9. Because patrons of Mississippi's dockside casinos are free to enter or leave the premises whenever they choose, the state does not keep accurate statistics on admissions.

tures on the nation's navigable waterways. In its history, the United States has rarely seen such a huge increase in maritime commercial activity in such a short period of time.²²

Despite the rapid growth and enormous economic impact of the riverboat gaming industry in a number of states, disputes involving gaming vessels will continue to be governed by a legal regime that is, in many respects, ill-suited to deal with the unique characteristics associated with casino gaming on floating structures. For example, courts have developed specific criteria to determine whether certain employees are "Jones Act Seamen" and whether particular floating structures are "vessels" for purposes of admiralty jurisdiction.²³ However, these judge-made legal criteria generally reflect concerns and values associated with traditional maritime shipping and, to a lesser extent, the offshore oil and gas industry rather than modern riverboat gaming.²⁴ Moreover, by necessity, these common law definitions are fact-specific and susceptible to unsatisfactory and arbitrary distinctions.²⁵

²² The obvious exception being increased maritime activity associated with mobilization in time of war. Even the rapid expansion of the steamer trade on western rivers, which grew to over 1,190 steamboats by 1846, took several decades. 6 *DICTIONARY OF AMERICAN HISTORY* 406 (1976).

²³ For a detailed discussion of these topics, see *infra* notes 184-306 and accompanying text.

²⁴ The difficulties encountered by courts attempting to apply traditional admiralty definitions to a changing waterborne and maritime commercial environment are well documented. See, e.g., Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 472-90 (1983) (discussing application of traditional maritime principles to special purpose structures); David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 93-130 (1985) (providing survey of case law relating to determination of seaman status).

²⁵ In describing what is necessary for a court to determine vessel status, one observer noted that "[l]ike the seaman status struggle, this has often been a confusing and tortured exercise in mental gymnastics." Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 TUL. L. REV. 373, 392-93 (1994) (citing *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 826 (5th Cir. 1984)). Similarly, other commentators have concluded that in trying to apply sensible criteria to determine seaman status, the courts have produced "chaos" and have "flounder[ed] in a sea of uncertainty." Engerrand & Bale, *supra* note 24, at 451, 494. One federal district court judge expressed his view that judicial interpretation of the Jones Act has held the law up to ridicule and that "[i]f one admires and respects the law, it is difficult to reconcile this admiration and respect with what has happened to

Riverboat casinos are especially difficult for courts to categorize under traditional admiralty definitions. The physical characteristics, functions, and geographical locations of these casinos are extraordinarily diverse. Riverboat casinos range from vessels that navigate on a regular basis,²⁶ to converted cruise ships,²⁷ to permanently moored ornamental structures.²⁸ Many gaming vessels are located on busy commercial waterways,²⁹ others are found on man-made canals where they are the exclusive users,³⁰ and some have been placed in mooring basins separated from navigable waters by levees or retaining walls.³¹ Employees on gaming vessels may include licensed crew members who are involved in the navigational functions of the vessels, or may include waitresses, bartenders or card dealers whose jobs are identical to restaurant or casino employees on land.

In coming years, courts will be called upon with increasing frequency to resolve disputes arising from the rapidly growing riverboat casino industry and its eclectic collection of employees, vessels, and maritime locations. This article focuses on tort liability law and its likely impact on the riverboat casino industry.³²

The first part of this article systematically surveys and categorizes all of the gaming vessels in operation through August, 1994.³³ A survey of this kind is important because

the Jones Act." Honorable Peter Beer, *Keeping Up With The Jones Act*, 61 TUL. L. REV. 379, 414 (1986).

²⁶ See *infra* notes 36-45 and accompanying text.

²⁷ See *infra* notes 46-49 and accompanying text.

²⁸ See *infra* notes 50-59 and accompanying text.

²⁹ See *infra* note 74 and accompanying text.

³⁰ See *infra* notes 76-78 and accompanying text.

³¹ See *infra* notes 83-87 and accompanying text.

³² Tort liability is certainly not the only maritime legal issue that needs to be examined in light of the growth and unique nature of the riverboat casino industry. Other issues of significant concern include: the application of maritime liens to gaming vessels; the ability of gaming vessel owners to limit their liability; rights and obligations under marine insurance policies; whether gaming vessels are subject to maritime salvage; and methods to better manage the conflict between federal admiralty and bankruptcy jurisdiction.

³³ For a compilation of this information, see *infra* Figure I.

the question of whether a particular personal injury or wrongful death claim falls within federal admiralty jurisdiction, or instead, is governed by state law, is dependent on the physical characteristics and geographical location of each gaming vessel.³⁴ The second part of this article examines whether floating casinos are subject to federal maritime law and provides an overview of the implications of admiralty jurisdiction on riverboat casino operations. Included is a discussion of how maritime tort jurisdiction is obtained and under what circumstances gaming vessels will be given "vessel status." The final part of this article examines the kinds of maritime personal injury and wrongful death claims that are likely to arise on gaming vessels and discusses future directions in this area of the law.³⁵

³⁴ For a discussion of the criteria giving rise to a maritime tort, see *infra* notes 66-133 and accompanying text.

³⁵ This article will not specifically address the important issue of maritime tort liability resulting from a catastrophic weather event such as a hurricane. Although much of the following discussion is relevant to the determination of liability in the event of a hurricane, that issue is very complex and deserves a more detailed treatment than can be accorded here.

FIGURE 1^a

Boat Names/ Start Date	Location	Length/ Width	Self- Propelled	Accessible to Navigable Waters ^b
Category I				
President 4/91	Davenport, IA	300' X 89'	Yes ^c	Yes
Mississippi Belle I 6/91	Clinton, IA	200' X 45'	Yes ^d	Yes
Sioux City Sue 1/93	Sioux City, IA	150' X 34'	Yes ^e	Yes
Diamond Jo 5/94	Dubuque, IA	150' X 40'	Yes ^f	Yes
Alton Belle 9/91	Alton, IL	220' X 65'	Yes ^g	Yes
Par-A-Dice 11/91	Peoria, IL	230' X 66'	Yes ^h	Yes
Casino Rock Island 4/92	Rock Island, IL	200' X 45'	Yes ⁱ	Yes
Empress I 1/6/92 & II 12/93	Joliet, IL	222' X 66'	Yes ^j	Yes
Silver Eagle 6/92	East Dubuque, IL	205' X 45'	Yes ^k	Yes
Players 2/93	Metropolis, IL	210' X 60'	Yes ^l	Yes
Northern/Southern Star 5/93	Joliet, IL	210' X 68'	Yes ^m	Yes
Casino Queen 6/93	E. St. Louis, IL	447' X 60'	Barge/Yes ⁿ	Yes

^a Figure 1 is based in part on information contained in *The "Big Picture" Revisited*, RIVERBOAT GAMING REPORT, (Pearson Publ. Co., Inc., Metairie, La.) Aug. 1994, at 1-8.

^b A gaming vessel is "accessible to a navigable water" if it is capable of navigating without having to remove a physical obstacle between its current docked location and a navigable waterway.

^c "Iowa Excursion Boat Gaming Statute." IOWA CODE ANN. §§ 99F.1-99F.18 (West Supp. 1994). Iowa allows gaming on excursion boats only. Dockside gaming is not allowed except for limited times when circumstances such as mechanical problems or adverse weather necessitate it. Generally, Iowa gaming boats must be self-propelled and provide a minimum excursion of three hours during season.

^d See *supra* note c.

^e See *supra* note c.

^f See *supra* note c.

^g "Illinois Riverboat Gambling Act." ILL. ANN. STAT. ch. 230 para. 10/1-12/23 (Smith-Hurd 1993). Illinois allows gaming on excursion boats only. Dockside gaming is not allowed. Generally, cruises are allowed only when river is in fact navigable and may not exceed four hours.

^h See *supra* note g.

ⁱ See *supra* note g.

^j See *supra* note g.

^k See *supra* note g.

^l See *supra* note g.

^m See *supra* note g.

ⁿ The *Casino Queen* (E. St. Louis, Ill.) and the *Casino Bell* (St. Charles, Mo.) were built by the same shipyard and are barge-type vessels that have permanent-

Boat Names/ Start Date	Location	Length/ Width	Self- Propelled	Accessible to Navigable Waters ^b
Hollywood Casino (2) 6/93	Aurora, IL	150' X 45'	Yes ^o	Yes
Casino Belle 5/94	St. Charles, MO	367' X 60'	Barge/Yes ^p	Yes
Riverside 7/94	Riverside, MO	201' X 45'	Yes ^q	Yes
St. Joseph 7/94	St. Joseph, MO	200' X 40'	Yes ^r	Yes
President-Miss. 8/92	Biloxi, MS	287' X 65'	Yes	Yes
Star Casino 10/93	New Orleans, LA	280' X 78'	Yes ^s	Yes
Queen of New Orleans 2/94	New Orleans, LA	245' X 50'	Yes ^t	Yes
Boomtown 7/94	Harvey, LA	250' X 65'	Yes ^u	Yes
Players 12/93	Lake Charles, LA	240' X 62'	Yes ^v	Yes
Harrahs 4/94	Shreveport, LA	210' X 78'	Yes ^w	Yes
Lady of The Ilse 5/94	Bossier City, LA	258' X 78'	Yes ^x	Yes
Queen of the Red 7/94	Bossier City, LA	290' X 70'	Yes ^y	Yes
None Currently Operating	Indiana	N/A	Yes ^z	Yes

ly attached propulsion modules that qualify them as "self-propelled" vessels. Interview with Captain Scott P. Cooper, U.S. Coast Guard, St. Louis, Mo. (Nov. 4, 1994).

^o See *supra* note g.

^p See *supra* note n.

^q "Missouri Excursion Gambling Boats Statute." MO. ANN. STAT. §§ 313.800-.850 (Vernon 1994). Missouri allows gaming on boats or ferries located on the Mississippi and Missouri Rivers. Dockside gaming is generally permitted except under special circumstances.

^r See *supra* note q.

^s "Louisiana Riverboat Economic Development and Gaming Control Act." LA. REV. STAT. ANN. §§ 4.501-562 (West Supp. 1995). Louisiana allows gaming on "paddle wheel driven" riverboats with U.S. Coast Guard approval to carry 600 passengers and crew. All gaming is restricted to designated rivers and waterways. Some parishes are not legally authorized to have dockside gambling when vessel is docked continuously for over forty-five minutes, except under special circumstances such as adverse weather. Other parishes are statutorily permitted to conduct dockside gaming on a routine basis.

^t See *supra* note s.

^u See *supra* note s.

^v See *supra* note s.

^w See *supra* note s.

^x See *supra* note s.

^y See *supra* note s.

^z "Indiana Riverboat Gaming State." IND. CODE ANN. §§ 4-33-1-1 to -15-4 (Burns Supp. 1994). Indiana allows gambling on self-propelled excursion boats only. Dockside gambling is generally not permitted, except under special circumstances such as inclement weather.

Boat Names/ Start Date	Location	Length/ Width	Self- Propelled	Accessible to Navigable Waters
Category II				
Admiral 5/94	St. Louis, MO	400' X 80'	No ^{aa}	Yes
Copa Casino 8/93	Gulfport, MS	505' X 90'	No	Yes
Cotton Club 12/93	Greenville, MS	246' X 58'	No	Yes
Category III				
Isle of Capri 8/92	Biloxi, MS	N/A	Barge No ^{bb}	Yes
Biloxi Belle 8/92	Biloxi, MS	217' X 44'	No	Yes
Casino Magic 5/93	Biloxi, MS	N/A	Barge No ^{cc}	Yes
Lady Luck 12/93	Biloxi, MS	N/A	Barge No ^{dd}	Yes
Grand Casino 1/94	Biloxi, MS	N/A	Barge No ^{ee}	Yes
Palace 4/94	Biloxi, MS	N/A	Barge No ^{ff}	Yes
Treasure Bay 5/94	Biloxi, MS	N/A	Barge No ^{gg}	Yes
Gold Shores 6/94	Biloxi, MS	N/A	Barge No ^{hh}	Yes
Boomtown 7/94	Biloxi, MS	N/A	Barge No ⁱⁱ	Yes
Casino Magic 9/92	Bay St. Louis, MS	N/A	Barge No ^{jj}	Yes
Grand Casino 5/93	Gulfport, MS	N/A	Barge No ^{kk}	Yes
Jubilee 1/94	Lake Shore, MS	N/A	Barge No ^{ll}	Yes
Lady Luck 2/93	Natchez, MS	N/A	Barge No ^{mm}	Yes

^{aa} MO. ANN. STAT. §§ 313.805, 313.812. These statutes grant special status to "a vessel built as a double-side wheel railroad ferry" or is "continuously docked in an area" near the Eads Bridge in St. Louis. That railroad ferry is the Admiral Casino which had its engines removed and is classified as a permanently moored structure by the U.S. Coast Guard. Interview with Captain Scott P. Cooper, U.S. Coast Guard, St. Louis, Mo. (Nov. 4, 1994).

^{bb} "Mississippi Gaming Control Act," MISS. CODE ANN. §§ 75-76-1 to -281 (1991). Mississippi's gaming statute allows dockside gaming on board barges with no self-propulsion capabilities.

^{cc} See *supra* note bb.

^{dd} See *supra* note bb.

^{ee} See *supra* note bb.

^{ff} See *supra* note bb.

^{gg} See *supra* note bb.

^{hh} See *supra* note bb.

ⁱⁱ See *supra* note bb.

^{jj} See *supra* note bb.

^{kk} See *supra* note bb.

^{ll} See *supra* note bb.

^{mm} See *supra* note bb.

Boat Names/ Start Date	Location	Length/ Width	Self- Propelled	Accessible to Navigable Waters
Category IV				
Las Vegas Casino 3/94	Greenville, MS	N/A	Barge No ⁿⁿ	No
Isle of Capri 8/93	Vicksburg, MS	N/A	Barge No ^{oo}	No
Harrahs 11/93	Vicksburg, MS	N/A	Barge No ^{pp}	No
Ameristar 2/94	Vicksburg, MS	N/A	Barge No ^{qq}	No
Rainbow	Vicksburg, MS	N/A	Barge No ^{rr}	No
Splash Casino 10/92	Tunica, MS	N/A	Barge No ^{ss}	No
Harrahs 11/93	Tunica, MS	N/A	Barge No ^{tt}	No
Ballys 12/93	Tunica, MS	N/A	Barge No ^{uu}	No
Southern Belle 2/94	Tunica, MS	N/A	Barge No ^{vv}	No
Treasure Bay 5/94	Tunica, MS	N/A	Barge No ^{ww}	No
Sam's Town 5/94	Tunica, MS	N/A	Barge No ^{xx}	No
Fitzgerald's 6/94	Tunica, MS	N/A	Barge No ^{yy}	No
Sheraton 7/94	Tunica, MS	N/A	Barge No ^{zz}	No
Hollywood 8/94	Tunica, MS	N/A	Barge No ^{aaa}	No
Lady Luck Rhythm & Blues 7/94	Coahoma, MS	N/A	Barge No ^{bbb}	No

ⁿⁿ See *supra* note bb.

^{oo} See *supra* note bb.

^{pp} See *supra* note bb.

^{qq} See *supra* note bb.

^{rr} See *supra* note bb.

^{ss} See *supra* note bb.

^{tt} See *supra* note bb.

^{uu} See *supra* note bb.

^{vv} See *supra* note bb.

^{ww} See *supra* note bb.

^{xx} See *supra* note bb.

^{yy} See *supra* note bb.

^{zz} See *supra* note bb.

^{aaa} See *supra* note bb.

^{bbb} See *supra* note bb.

II. SURVEY OF GAMING VESSELS

Figure I provides a comparative summary of the physical and locational characteristics of the gaming vessels currently in operation. These vessels may generally be grouped into four primary categories for purposes of further analysis--Category I: Gaming vessels capable of navigating under their own power; Category II: Gaming vessels capable of self-propelled navigation in the past, but no longer; Category III: Permanently moored gaming vessels without self-propulsion, built on barges and located on navigable waterways; Category IV: Permanently moored gaming vessels without self-propulsion, built on barges and separated from navigable waterways.

A. *Category I - Gaming Vessels Capable of Navigating Under Their Own Power*

1. *Category I(a) Gaming Vessels that Navigate Regularly*

All states with legalized riverboat gaming, except Mississippi, generally prohibit gambling while the vessel is dockside.³⁶ There are, however, some exceptions to this general rule. For example, some states allow dockside gaming if water or weather conditions present a danger to the vessel or its passengers.³⁷ Louisiana and Missouri have also exempted a very limited number of vessels in specific geographical areas from the cruising requirement.³⁸

³⁶ See *supra* Figure I.

³⁷ See, e.g., IND. CODE ANN. § 4-33-9-2 (Burns Supp. 1994) (authorizing dockside gaming during inclement weather).

³⁸ Louisiana allows dockside gaming on vessels in "any parish which borders the Red River beginning five miles south of the Kansas City Southern Company/Louisiana Arkansas Crossing Railroad Bridge in Rapides Parish and ending five miles north of the Mid-South Company Railroad Bridge in Caddo Parish." LA. REV. STAT. ANN. § 4:525(B)(1)(b)(i) (West Supp. 1995). Missouri allows dockside gaming on:

a vessel built as a double side wheel railroad ferry which is continuously docked in an area approximately four hundred sixty feet long and ninety feet wide on the Mississippi River, in any city not within a county, or a vessel which is continuously docked within six hundred fifty feet north

All vessels that fall under Category I(a) are required to make several cruises each day ranging in length from three to eight hours. These vessels must be self-propelled and must meet all applicable Coast Guard safety and navigation regulations.³⁹ These gaming vessels are "vessels" in every sense of the word, facing the same variety of maritime hazards as traditional cruise ships or passenger excursion vessels.⁴⁰

2. Category I(b) Gaming Vessels That Are Capable of Navigating on a Regular Basis But Remain Dockside

There are a number of gaming vessels, primarily in Louisiana, which are fully capable of navigating under their own power, but have chosen to remain dockside.⁴¹ These vessels have taken advantage of provisions under Louisiana law that allow vessels to engage in dockside gaming should the master "reasonably determine and certify in writing that the weather conditions or the water conditions . . . present a danger to the riverboat, its passengers, and crew."⁴² Many gaming vessels in Louisiana have not moved from their dockside moorings in months, claiming exemptions for a variety of hazards ranging from the discovery of a submerged metal obstruction near a

and one thousand three hundred feet south of the Eads Bridge across the Mississippi River in any city not within a county.

MO. ANN. STAT. § 313.805(15) (Vernon 1994). Missouri also allows dockside gambling if it would be in the best interest of the state and public welfare. *Id.*

³⁹ See generally Scott P. Cooper, *Coast Guard Regulation of Gaming Vessel Operations*, Presented at the Gaming Seminar, Tulane Law School 2 (Sept. 8-9, 1994) (transcript on file with author) (discussing coast guard's regulatory and public policy functions in relation to riverboat casinos).

⁴⁰ For a sobering collection of views on the potential safety hazards associated with the operation of gaming vessels on the lower Mississippi River, see *Lower Mississippi Navigational Safety of Gambling Vessels: Hearing Before the House Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries*, 103rd Cong., 1st Sess. 79 (1993).

⁴¹ Louisiana law only allows dockside gaming in a narrow geographical area along the Red River. LA. REV. STAT. ANN. § 4:525(B)(1)(b)(i) (West Supp. 1995). Gaming may not be conducted aboard vessels in other locations while the vessel is docked, "unless the vessel is docked for less than forty-five minutes between excursions." *Id.* § 4:525(B)(1)(a).

⁴² *Id.*

navigational channel to heavy traffic on the Mississippi River.⁴³ It is not known how long these gaming vessels intend to remain dockside, but it should be noted that each vessel continues to employ a full compliment of licensed crew members in order to maintain the integrity of its nautical equipment to sail on short notice.⁴⁴

In addition to the Louisiana gaming vessels, the *President* in Biloxi, Mississippi, is also a Category I(b) vessel. Although self-propelled and capable of sailing on short notice, the *President* can be distinguished from vessels in Louisiana because it has been deemed "permanently moored" by the United States Coast Guard and is not required by Mississippi law to leave its dockside facility.⁴⁵

B. Category II - Gaming Vessels Capable of Self-Propelled Navigation in the Past, But Without Present Capability

Three currently operating dockside vessels were at one time capable of navigating under their own power but have since had their engines and other navigational equipment removed.⁴⁶ These vessels can be distinguished from the barg-

⁴³ Alan Sayre, *La. Casino Industry Stumbling*, CLARION-LEDGER (Jackson, Miss.), Sept. 6, 1994, at B5. For example:

one New Orleans-area riverboat has stayed at port, saying its channel has been declared unsafe for sailing. Another is docked at night, citing heavy traffic on the Mississippi River. A third has never sailed, saying heavy barge traffic on its canal makes travel unsafe. The fourth is staying at the dock until nearby power lines coming off the water can be raised.

Id.; see also Fred Faust, *Cheer For Top 10 Reasons Casinos Stay Docked*, ST. LOUIS POST DISPATCH, July 25, 1994, at X6 (observing that cruise requirements increase operating costs and inconvenience to patrons, which make casino operators want to stay dockside).

⁴⁴ There is a significant amount of political pressure on the gaming vessels to cruise because Louisiana has granted a monopoly on land-based gambling to a single casino that is scheduled to be built in the New Orleans Convention Center. Sayre, *supra* note 43, at B5. If the monopoly is breached, the land-based casino can refuse to pay the state an estimated \$100 million per year in tax revenue. *Id.*

⁴⁵ Design specifications of the *President* casino and documentation from the Coast Guard granting it "permanently moored" status are on file with the author.

⁴⁶ See *supra* Figure I. Two of these casinos operate in Mississippi, and the

es in Categories III and IV because, unlike specially constructed casino barges, they were designed and constructed to transport passengers or cargo over water.⁴⁷ These vessels are permanently moored and, except for their historical design characteristics, generally operate in the same fashion as the dockside gaming vessels listed in Categories III and IV.⁴⁸ However, the past nautical capability of the gaming vessels in Category II may have some bearing on whether a tort committed on board the vessel will be deemed a maritime tort.⁴⁹

C. Category III - Permanently Moored Gaming Vessels Without Self-Propulsion, Built on Barges and Located on Navigable Waterways

All of the gaming vessels in this category are located within the State of Mississippi.⁵⁰ Because Mississippi has no requirement that its dockside vessels cruise, all of the vessels in Category III were specially designed and constructed to serve as permanently moored floating structures.⁵¹ Generally, these casinos consist of a large, multi-storied ornamental superstructure which is attached to two or more adjoining barges that has no mode of self-propulsion.⁵² The vessels are secure-

third is found in St. Louis, Missouri.

⁴⁷ The *Admiral Casino*, located along the St. Louis, Missouri waterfront, is a converted railroad ferry. See *supra* Figure I. The *Copa Casino* in Gulfport, Mississippi is a converted passenger cruise ship. See *supra* Figure I. The *Cotton Club Casino* in Greenville, Mississippi, is a converted sternwheel riverboat. See *supra* Figure I.

⁴⁸ See *infra* notes 50-59 and accompanying text.

⁴⁹ See *infra* notes 150-52 and accompanying text.

⁵⁰ See *supra* Figure I. In 1994, Mississippi had 13 casinos falling into Category III. See *supra* Figure I.

⁵¹ A few gaming vessels, such as the *Biloxi Belle* in Biloxi, Mississippi, were constructed as floating restaurants and later converted into casinos. Like the specially-built casino barges, these vessels were constructed primarily for ornamental purposes, are not self-propelled and have none of the nautical features necessary to transport passengers over water. For a further discussion of the *Biloxi Belle*, see *infra* notes 270-82 and accompanying text.

⁵² The *Imperial Palace*, scheduled to be located in the Back Bay of Biloxi, Mississippi, will be the largest floating casino ever built. See RIVERBOAT GAMING REPORT, *supra* note 2, at 3. It will reportedly have over 100,000 square feet of gaming space and will be constructed on nine barges. *Id.*

ly moored to pilings driven into the water-bottom, which allow the vessels to rise and fall as the tide fluctuates without being affected by waves, currents or propeller wash from passing ships.

Many Category III gaming vessels are integrated into larger land-based development projects.⁵³ Restaurants, hotels, gift shops, and parking structures occasionally obscure the gaming vessel to such an extent that visitors are unaware of where the floating structure begins and the land-based structures end.⁵⁴ Utilities such as gas, electricity, and water are provided from shore.

Category III gaming vessels are clearly designed to remain permanently moored except when they need to be moved for purposes of overhaul, drydocking or changes in location. However, the permanent status of these gaming vessels does not completely negate the fact that they are still subject to a variety of maritime hazards.⁵⁵ Moreover, they are capable of being detached from their mooring systems on relatively short notice and of sailing away with the aid of a tug.⁵⁶ In light of these conflicting maritime and non-maritime characteristics, significant legal questions remain regarding tort liability on Category III gaming vessels.

⁵³ Construction of land-based facilities is expected to increase in the future as a result of a recent ruling by the Mississippi Gaming Commission requiring that each casino applying for an initial license or for renewal of an existing license spend 25% of its total casino cost on land-based facilities. Lee Ragland, *Casinos Told to Construct More on Land*, CLARION-LEDGER (Jackson, Miss.), Oct. 14, 1994, at A1. Theme parks, golf courses, marinas, entertainment complexes, and hotels will satisfy the requirement. *Id.*

⁵⁴ See, e.g., Laurel S. Walters, *Casino Invasion Stirs up Mississippi Gulf Coast*, CHRISTIAN SCI. MONITOR, May 25, 1994, at 11 (noting that many casinos on Mississippi Gulf Coast have more square feet on land than on water).

⁵⁵ For a discussion of some of these hazards, see *infra* notes 158-59 and accompanying text.

⁵⁶ See *infra* note 157 and accompanying text. Requirements of hurricane evacuation plans necessitate that the casinos be capable of changing locations upon short notice. See *infra* note 157 and accompanying text.

D. Category IV - Permanently Moored Gaming Vessels Without Self-Propulsion, Built on Barges and Separated From Navigable Waterways

Gaming vessels in Category IV resemble the vessels in Category III except for location. All Category IV vessels are located in the State of Mississippi along the Mississippi River.⁵⁷ Unlike the gaming vessels in Category III, which are moored directly on navigable waterways, Category IV vessels are located in mooring basins that are physically separated from the Mississippi River. These basins are specially engineered to protect the vessels from rapidly changing water conditions on the river. Without the basins, gaming vessels would have to contend with flood conditions during some seasons and low water problems during others. Some casino operators, after constructing most of the gaming vessel on site, pump water from the Mississippi River several hundred feet inland into artificial mooring ponds.⁵⁸ Others have created mooring basins adjacent to the river by constructing a series of containment walls. Pre-constructed gaming vessels are then floated into the basins by excavating a break in the existing levee. Once the vessel is in place, the levee is reconstructed and the riverbank is reinforced. Water levels in the mooring basins are kept uniform by pumping in or draining off river water as required.

Regardless of the construction methods used or the precise location of the gaming vessels in Category IV, there is no question that they are incapable of navigation as long as they remain inside the mooring basins.⁵⁹ In addition, the kinds of

⁵⁷ See *supra* Figure I. There were 15 Category IV casinos in Mississippi in 1994. See *supra* Figure I.

⁵⁸ For example, the *Treasure Bay Casino* in Robinsonville, Mississippi is located in a mooring basin that is fed by water pumped from the river along a nearly 2000 foot non-navigable canal. See *Treasure Bay Casino, Summary Description of Approved Site, Dockside Gaming Vessel and On Shore Facilities*, 4 (Sept. 1993) (on file with author). The original design plans called for the canal to be landscaped to reflect the casino's pirate theme, and includes tropical lagoons and a waterfall. *Id.*

⁵⁹ The bankrupt *Southern Belle Casino* in Tunica, Mississippi provides an

maritime hazards that may exist on the Mississippi River are absent once the vessels are enclosed in shallow and totally self-contained ponds.

III. ARE GAMING VESSELS SUBJECT TO FEDERAL MARITIME LAW?

It is beyond the scope of this article to provide a comprehensive treatment of the legal implications associated with federal admiralty jurisdiction over tort claims, especially the complex interaction between state law and federal admiralty law.⁶⁰ For purposes of this article it is sufficient to note that if the tort is deemed non-maritime, state substantive and procedural law controls.⁶¹ On the other hand, if the claim is deemed a maritime tort, a unique set of remedies governed by federal maritime law may be available.⁶² A maritime claim

example of the kinds of difficulties that many Category IV gaming vessels will likely face if they try to relocate. The owners of the *Southern Belle* wanted to move the vessel to Biloxi, but were unable to meet the environmental regulatory requirements associated with widening the narrow man-made canal leading to the Mississippi River. Louise Taylor, *Belles Scurry for Cover*, THE SUN HERALD (Biloxi, Miss.), Sept. 1, 1994, at A1.

⁶⁰ For example, the implications of *in rem* jurisdiction and its concomitant creation, the maritime lien, are complicated and require more detailed treatment than can be accorded here. For detailed treatment of this area, see generally GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY §§ 1-12 to -19 (2d ed. 1975); ERASTUS C. BENEDICT, 1 BENEDICT ON ADMIRALTY LAW § 16a (A. Sann et al. eds., 7th ed. 1982); 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-2 (2d ed. 1994); David P. Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 SUP. CT. REV. 158, 160-66 (1960). The federal-state law relationship has been deemed "[p]erhaps the thorniest area of admiralty law." 1 SCHOENBAUM, *supra* at 134.

⁶¹ The rights and remedies available to claimants under state law may be significantly different than those offered under federal maritime law. Procedural matters such as the burden of proof requirements and discovery rules may be different, as may substantive matters such as existence of certain remedies and caps on damages. More importantly, if the injured claimant was an employee of a gaming vessel, state workers' compensation statutes may provide the exclusive remedy instead of the more generous remedies offered to "seamen" under federal statutes and general maritime law. See *infra* notes 285-305 and accompanying text.

⁶² For a discussion of these remedies, see *infra* notes 184-199 and accompanying text.

may be brought in federal court or in state court under the "Saving to Suitors Clause,"⁶³ which generally requires state courts to apply federal admiralty law in these actions.⁶⁴

Substantial legal and financial implications are attached to the question of whether tort claims by employees or passengers injured aboard gaming vessels fall within federal admiralty jurisdiction.⁶⁵ Consequently, it will be beneficial to examine what is required for a tort to be deemed maritime, as well as the kinds of remedies that may be available.

⁶³ The judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2, cl. 3. The Judiciary Act of 1789, which has been succeeded by 28 U.S.C. § 1333(1) (1988), bestows "exclusive" admiralty jurisdiction on the federal district courts, saving "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." State courts therefore have concurrent jurisdiction over *in personam* admiralty suits.

Well into the early twentieth century, there was still some disagreement as to whether maritime cases brought in state court were governed by state or federal substantive law. The Supreme Court ended the dispute by ruling in *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) and *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 375 (1918), that maritime matters brought in either state or federal tribunals were constitutionally required to be governed by a uniform federal law. For an interesting discussion of the confused state of the law prior to *Jensen* and *Chelentis*, see DAVID ROBERTSON, ADMIRALTY AND FEDERALISM 148-93 (1970). For a discussion of how the "savings to suitors clause" applies to maritime tort actions brought under the Jones Act, see *infra* notes 285-306 and accompanying text.

⁶⁴ *Chelentis*, 247 U.S. at 375; *Jensen*, 244 U.S. at 218.

⁶⁵ For example, if all of the employees on a particular gaming vessel are found to be "Jones Act Seamen," the gaming vessel operator's potential exposure to personal injury liability claims may be much higher than if the employees are found to be non-maritime employees. This increased exposure may cause the operator's insurance premiums to increase. See *infra* notes 184-306 and accompanying text. Conversely, if employees of a gaming vessel are not considered "seamen," it is likely that many of these employees may not be fully compensated for serious injuries or death if they are forced to rely exclusively on the benefits provided by a state workers' compensation program alone. Furthermore, admiralty jurisdiction may provide employees and passengers a broad range of procedural and substantive benefits not accorded under state law. For instance, the doctrine of *res ipsa loquitur* is somewhat more favorable to plaintiffs under general maritime law than in most states. Merlyn P. O'Keefe & Paul S. Edelman, *Injuries to Ship Passengers*, 5 MAR. L. REP. 65, 67 (1993).

A. What is a Maritime Tort?

1. Maritime Locality

The traditional test for federal admiralty tort jurisdiction was based entirely upon whether the incident took place on navigable waters.⁶⁶ Although maritime locality is no longer the sole jurisdictional requirement, it remains a necessary element of admiralty jurisdiction.⁶⁷ Torts that occur on coastal waters subject to the ebb and flow of the tide,⁶⁸ and on publicly navigable rivers, streams, lakes, and man-made bodies of water may fall within admiralty jurisdiction.⁶⁹ The primary test for purposes of admiralty jurisdiction was first enunciated in *The Daniel Ball*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be

⁶⁶ In an early decision, the United States Supreme Court remarked:

The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters is of admiralty cognizance.

The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865).

⁶⁷ For a discussion of additional criteria developed in recent years, see *infra* notes 89-133 and accompanying text.

⁶⁸ See *Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022, 1026 (4th Cir. 1986) (holding that admiralty jurisdiction extends to mean high tide line and is not subject to fluctuations based upon ebb and flow of tide).

⁶⁹ See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851) (expanding admiralty jurisdiction beyond traditional boundary created by ebb and flow of tide to all public navigable waterways).

carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.⁷⁰

The *Daniel Ball* test enumerates two important elements to determining admiralty jurisdiction. First, the waterway must be available as an artery of interstate or foreign commerce. Consequently, a body of water that lies wholly within one state and is not capable of feeding into an interstate waterway is not navigable for purposes of admiralty jurisdiction.⁷¹ Second, the waterway must presently be used or capable of being used for commercial shipping.⁷² Commercial shipping has been defined very broadly to include all varieties of commercial watercraft such as barges, flatboats, and other special purpose vessels, but use by recreational vessels alone is not considered sufficient.⁷³

The vast majority of gaming vessels currently operate on bodies of water that clearly meet the maritime locality requirement. Vessels in Categories I, II, and III are located on tidally influenced harbors, bays or inlets easily accessible to the Gulf of Mexico, or on lakes and rivers where interstate commercial maritime activity occurs.⁷⁴ The only gaming vessels

⁷⁰ *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871). According to one well-known treatise on the subject:

The admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state.

GILMORE & BLACK, *supra* note 60, at 31-32.

⁷¹ *Reynolds v. Bradley*, 644 F. Supp. 42, 44-45 (N.D.N.Y. 1987). A body of water may not be susceptible of being used as an interstate artery of commerce because a lockless dam is located downstream or because of natural conditions such as the narrowness or shallowness of the water or other natural or man-made obstacles. 1 SCHOENBAUM, *supra* note 60, at 67-72.

⁷² *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983). For a discussion of the requirement that a waterway be currently navigable or susceptible of being used for navigation, see *infra* notes 84-87 and accompanying text.

⁷³ See generally BENEDICT, *supra* note 60, § 142; 1 SCHOENBAUM, *supra* note 60, at 88-92.

⁷⁴ For a summary of these locations, see *supra* Figure I. There may be some

that arguably fail to meet the maritime locality requirement are those floating structures in Category IV located in the State of Mississippi which are situated in mooring basins or canals contiguous to the Mississippi River, but which are separated from the river either by a shallow canal or a retaining wall of some kind.⁷⁵

Nevertheless, torts that occur on small canals adjacent to navigable waterways have been found to meet the maritime locality requirement.⁷⁶ For example, admiralty jurisdiction was found when a shipyard employee was killed on a vessel moored on a 600 foot dredged slip located on private property adjoining the Detroit River and used exclusively as a site for floating dry docks and other ship repair facilities.⁷⁷ Admiralty jurisdiction was also found on a six-foot-deep slough connected on its north and south ends to the Mississippi River through which tugs towed a showboat.⁷⁸

If a gaming vessel navigates to its permanent place of mooring through a particular canal, either under its own power or with the aid of tugs, that canal should meet the maritime

argument regarding gaming vessels operating on the Red River in Louisiana which is navigable only seasonally. However, there is considerable authority to the effect that seasonal navigability is sufficient to give rise to admiralty jurisdiction. See *Wilder v. Placid Oil Co.*, 611 F. Supp. 841, 847 (W.D. La. 1985) (noting that seasonally navigable waters are considered "navigable waters" for purposes of admiralty jurisdiction), *aff'd sub nom.* *Sanders v. Placid Oil Co.*, 861 F.2d 1374 (5th Cir. 1988).

⁷⁵ See *supra* notes 57-59 and accompanying text.

⁷⁶ See generally 2 AM. JUR. 2D *Admiralty* § 144 (1994).

⁷⁷ *La Casse v. Great Lakes Eng'g Works*, 219 N.W. 730, 733 (Mich. 1928). In *La Casse*, the court found that the dredged slip was a navigable waterway. *La Casse*, 219 N.W. at 733.

⁷⁸ *Clinton Bd. of Park Comm'rs v. Claussen*, 410 F. Supp. 320, 323 (S.D. Iowa 1976); see also *McCormick v. United States*, 680 F.2d 345, 347 (5th Cir. 1982) (finding shallow, isolated body of water to be navigable). The *McCormick* court held that the jurisdiction of the admiralty courts over navigable waters extends from shoreline to shoreline. *McCormick*, 680 F.2d at 347 (citing *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970); *United States v. Turner*, 175 F.2d 644 (5th Cir.), *cert. denied*, 338 U.S. 851 (1949)). However, neither case relied on in *McCormick* is particularly persuasive given the fact that both dealt with the definition of navigable waters for purposes of determining title to submerged lands rather than admiralty jurisdiction. See *Ray*, 423 F.2d at 18; *Turner*, 175 F.2d at 649.

locality requirement.⁷⁹ The fact that little if any commercial maritime activity occurs on the canal other than gaming activity is not determinative for purposes of admiralty jurisdiction.⁸⁰

Conversely, if a gaming vessel does not navigate through a canal and is instead constructed on-site in a mooring basin of some kind, it is unlikely that the maritime locality requirement is met. When a gaming vessel is physically separated from the adjoining navigable waterway, it is incapable of supporting maritime commerce.⁸¹ This is true regardless of whether the body of water could easily be connected to an interstate commerce system by removing the physical obstruction.⁸²

The question of maritime locality is more problematic in situations where a gaming vessel navigates under its own power or is towed to a site on navigable waters and a retaining

⁷⁹ To meet this requirement, however, the canal must continue to be accessible to public navigation and not physically closed or obstructed. See *infra* notes 83-87 and accompanying text.

⁸⁰ The generation of commercial revenue aboard a particular gaming vessel is probably sufficient for a finding that the waterway in which it is operating is capable of supporting commercial maritime commerce. For example, in defining navigable waters for purposes of admiralty jurisdiction, the Supreme Court in *United States v. The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874), stated:

[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. . . .

The capability of use by the public for purposes of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use.

The Montello, 87 U.S. (20 Wall.) at 441.

⁸¹ See *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 921 F.2d 775, 779 (8th Cir. 1990) (holding lake not subject to admiralty jurisdiction because of circumstance of lockless dam), *cert. denied*, 502 U.S. 898 (1991); *Strother v. Bren Lynn Corp.*, 671 F. Supp. 1118, 1119 (W.D. La.) (finding shallow inland marsh was clearly incapable of supporting maritime commerce), *aff'd.*, 873 F.2d 1023 (5th Cir. 1987).

⁸² Admiralty jurisdiction must be determined at the time of the loss. Consequently, a landlocked lake cannot be considered navigable simply because it could be potentially connected to an interstate commerce system by removing a narrow strip of land. *Oseredzuk v. Warner Co.*, 354 F. Supp. 453, 456 (E.D. Penn. 1972), *aff'd.*, 485 F.2d 680 (1973), *cert. denied*, 415 U.S. 977 (1974); see also *Three Buoys*, 921 F.2d at 778 (stating that test for navigability is one of "contemporary navigability in fact").

wall or mooring basin that physically separates it from the adjoining waterway is subsequently constructed.⁸³ There is some authority for the proposition that historical commercial use is sufficient to establish admiralty jurisdiction.⁸⁴ In fact, this rule may appeal to some observers who are disturbed by the prospect of gaming vessels exempting themselves from admiralty jurisdiction by voluntarily creating man-made obstacles to navigation.⁸⁵ Despite its superficial appeal, the historic commercial use rule has been severely criticized by a number of courts and commentators as irrelevant to the concerns of admiralty jurisdiction, and, consequently, has fallen into disfavor.⁸⁶ In recent years, most courts have adopted a test for maritime locality that focuses upon current navigability and the possibility of interstate travel by water.⁸⁷

To summarize, most gaming vessels are located on harbors, bays, rivers, lakes, or canals that are navigable in fact and therefore meet the maritime locality test for maritime torts. However, there are approximately fifteen gaming vessels located along the Mississippi River in the State of Mississippi that are floating in mooring basins physically separated from adjoining navigable waters. Because the mooring basins are not capable of being used as highways of commerce in interstate trade, they should not fall under federal admiralty jurisdiction at least for purposes of maritime tort liability.⁸⁸

⁸³ See *supra* notes 57-59 and accompanying text.

⁸⁴ See, e.g., *George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968) (finding that waterway "navigable prior to construction of [a] dam . . . continues to be considered . . . navigable"); *Madole v. Johnson*, 241 F. Supp. 379, 381 (W.D. La. 1965) (finding admiralty jurisdiction to exist over boating accident on lake that was once unobstructed river despite present containment by dam).

⁸⁵ There is no evidence to suggest that casino operators have constructed mooring basins and retaining walls for the purpose of avoiding admiralty jurisdiction. The reason that gaming vessels are placed in mooring basins is to better control the marine environment so as to avoid problems associated with rising and falling water levels. See *supra* notes 57-59 and accompanying text.

⁸⁶ For a detailed and thoughtful critique of the commercial use rule, see 1 SCHOENBAUM, *supra* note 60, at 15-17. See also GILMORE & BLACK, *supra* note 60, at 33 n.103; 2 AM. JUR. 2D *Admiralty* § 142 (1994).

⁸⁷ See 1 SCHOENBAUM, *supra* note 60, at 69-72.

⁸⁸ This does not mean that such gaming vessels will not be subject to admi-

2. Maritime Nexus

Over the past two decades, the Supreme Court has refined the test for determining admiralty jurisdiction. In addition to the so-called "locality" test, current doctrine also requires that the tortious incident have a potential impact on maritime commerce and bear a substantial relationship to traditional maritime activity.⁸⁹ These two requirements came about as a result of a trilogy of cases beginning in 1972 with *Executive Jet Aviation, Inc. v. Cleveland*,⁹⁰ which involved a plane crash in the navigable waters of Lake Erie.⁹¹ The Court denied admiralty jurisdiction and held that maritime locality alone is not sufficient to bring a tort within federal admiralty jurisdiction.⁹² It found that "reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purpose of maritime law than is a purely mechanical application of the locality test."⁹³ The test for admiralty jurisdiction, which now required "locality" plus "maritime nexus," was further refined in *Foremost Ins. Co. v. Richardson*.⁹⁴ In *Foremost*, the maritime nexus rule was satisfied

rality jurisdiction for other purposes such as to enforce maritime liens. In fact, a maritime lien has already been enforced against one Mississippi gaming vessel that is located in a mooring basin. For a complete discussion of this issue, see E. Psarellis et al., *Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling*, 6 U.S.F. MAR. L.J. 49, 66-68 (1993).

⁸⁹ See *Sisson v. Ruby*, 497 U.S. 358, 360 (1990) (granting admiralty jurisdiction where "substantial relationship" to traditional maritime activity was present).
⁹⁰ 409 U.S. 249 (1972).

⁹¹ *Executive Jet*, 409 U.S. at 250. Shortly after take off, a chartered jet aircraft ingested into its engines several sea gulls flying near the airport runway in the jet's path of ascent. *Id.* The jet stalled, descended toward the airport, and crashed into Lake Erie nearly one-fifth of a mile from the airport. *Id.*

⁹² *Id.* at 261. The Court noted that "[i]t is hard to think of any reason why access to federal court should be allowed without regard to amount of the controversy or citizenship of the parties merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land." *Id.* at 257-58 (quoting *Study of the Division of Jurisdiction Between State and Federal Courts* (American Law Institute) 233 (1969)).

⁹³ *Id.* at 261.

⁹⁴ 457 U.S. 668, 674 (1982). Although the *Executive Jet* involved a jet crashing into navigable waters, the *Foremost* Court recognized that the *Executive Jet* maritime nexus requirement was not limited to the aviation context. *Foremost*, 457

when two recreational vessels collided on the Amite River in Louisiana.⁹⁵ The Court refused to require that the maritime activity be commercial as long as it had a "potential disruptive impact" on maritime commerce.⁹⁶ An accident between recreational vessels on navigable waters was held to satisfy the "maritime nexus" test because it posed a potential threat to other vessels on the waterway.⁹⁷

A final refinement was handed down in *Sisson v. Ruby*.⁹⁸ In *Sisson*, a fire broke out aboard a recreational vessel docked in a marina on Lake Michigan which damaged several neighboring vessels.⁹⁹ The owner of the vessel sought admiralty jurisdiction so that he could invoke the provisions of the Limitation of Liability Act.¹⁰⁰ The Supreme Court rejected the argument that *Foremost* required some negligence in navigation in order to meet the maritime nexus requirement.¹⁰¹ Instead, it granted admiralty jurisdiction by holding that the fire at the

U.S. at 674.

⁹⁵ *Id.*

⁹⁶ *Id.* at 674. According to the majority, "The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce." *Id.* at 675 (footnote omitted).

⁹⁷ *Id.* at 677.

⁹⁸ 497 U.S. 358 (1990).

⁹⁹ *Sisson*, 497 U.S. at 360. As a result of the extensive damage caused by the fire, owners of the damaged vessels and the marina filed claims for damages against *Sisson* in excess of \$275,000. *Id.*

¹⁰⁰ The Limitation of Liability Act "limits the liability of an owner of a vessel for any damage done 'without the privity or knowledge of such owner' to the value of the vessel and its freight." *Id.*; see 46 U.S.C. app. § 183(a) (1982 & Supp. V 1994). Consequently, *Sisson* argued that his damage should be limited to \$800, the after-fire salvage value of his boat. *Sisson*, 497 U.S. at 360.

¹⁰¹ *Sisson*, 497 U.S. at 362, 366-67. The Court noted that the interest in protecting commercial shipping "cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity." *Id.* at 362 (quoting *Foremost*, 457 U.S. at 674-75). Enumerating actual navigation in *Foremost* as conduct "substantially relat[ing] to traditional maritime activity" was intended as an example of and not the only instance of maritime activity. *Id.* at 366-67. "[T]he protection of maritime commerce' . . . cannot be fully vindicated unless 'all operators of vessels on navigable waters are subject to uniform rules of conduct.'" *Id.* at 367 (quoting *Foremost*, 457 U.S. at 675) (citations omitted).

marina created a "potential hazard to maritime commerce" that bore a "substantial relationship" to traditional maritime activity.¹⁰²

The Court placed great emphasis on the need for uniform rules of conduct for all maritime users and, therefore, required that any jurisdictional inquiry be based on a particular tortious incident's *potential* rather than *actual* effect in disrupting maritime commerce.¹⁰³ It provided the following guidance on how to apply this part of the revised maritime nexus test:

We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on [Sisson's vessel] more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity. Here, the general features—a fire on a vessel docked at a marina on navigable waters—plainly satisfy the requirement of potential disruption to commercial maritime activity.¹⁰⁴

In other words, fact specific jurisdictional inquiry is unacceptable. Courts are directed instead to speculate about broader categories of situations, including worst case scenarios if necessary, when determining whether a particular incident has the potential to disrupt commercial maritime activity.¹⁰⁵ The *Sisson* Court specifically approved the result in *Foremost*, where the Court found a potential disruption of commercial

¹⁰² *Id.* at 362 (citing *Foremost*, 457 U.S. at 675 n.5). The Court reasoned that "a fire that began on a noncommercial vessel at a marina located on a navigable waterway . . . has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels." *Id.*

¹⁰³ *Id.* at 363.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

maritime activity on the seldom used Amite River, by broadly analogizing the likely effects of a similar collision at the mouth of the commercially busy St. Lawrence Seaway.¹⁰⁶ Similarly, *In re Complaint of Bird*¹⁰⁷ required the court to determine whether a maritime tort occurred when a passenger was pushed overboard from a recreational vessel operating on a shallow part of a river with no commercial traffic in the area.¹⁰⁸ In concluding that a maritime tort did occur, the court noted that *Foremost* and *Sisson* required it to "remove the scene of the accident to the busiest of maritime thoroughfares and then ask whether a passenger thrown overboard from a pleasure craft on that major thoroughfare ha[d] the potential of disrupting maritime activity."¹⁰⁹

Fact specific determinations were deemed equally unacceptable in deciding whether a "substantial relationship to traditional maritime activity" existed so as to satisfy the second prong of the revised nexus test.¹¹⁰ Once again, the *Sisson* Court directed that the activity should be "defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."¹¹¹ The Court refused to find that navigation alone can be characterized as substantially related to traditional maritime activity,¹¹² and asserted

¹⁰⁶ *Sisson*, 497 U.S. at 363 (citing *Foremost*, 457 U.S. at 670).

¹⁰⁷ 794 F. Supp. 575 (D.S.C. 1992).

¹⁰⁸ *Bird*, 794 F. Supp. at 576. Bird was sued by a passenger aboard his 34-foot pleasure boat for negligently allowing a known excessive drinker aboard who subsequently pushed the plaintiff overboard, causing injury. *Id.* Bird sought declaratory and injunctive relief under the Limitation of Liability Act, asserting that the federal court had maritime tort jurisdiction over the action. *Id.*

¹⁰⁹ *Id.* at 580; see also *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993) (holding that consideration of general features of type of incident involved is necessary to determine whether incident is likely to disrupt commercial activity), *aff'd sub nom.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

¹¹⁰ *Sisson*, 497 U.S. at 364.

¹¹¹ *Id.* (citing *Executive Jet*, 409 U.S. at 269-70) (noting that in *Executive Jet*, "the relevant activity was not a plane sinking in Lake Erie, but air travel generally").

¹¹² *Id.* at 366-67. The Court noted that *Foremost* identified "navigation" only as an example of conduct "substantially related to traditional maritime activity" rather than the sole instance. *Id.* (citing *Foremost*, 457 U.S. at 675 n.5). If navi-

that "[t]he need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial."¹¹³ Given this broad perspective, the Court had little difficulty in finding that "the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity. . . .'"¹¹⁴

Subsequent to *Executive Jet* and *Foremost*, the federal Circuit Courts of Appeals developed a variety of balancing tests to determine whether a maritime nexus exists.¹¹⁵ Most circuits adopted, to some degree, the four factors originally set out by the Fifth Circuit in *Kelly v. Smith*.¹¹⁶ These factors included: "[1] the functions and roles of the parties; [2] the types of vehicles and instrumentalities involved; [3] the causation and type of injury; and [4] traditional concepts of the rule of admiralty law."¹¹⁷ The *Sisson* Court refused either to endorse

gation alone were the test, then the appropriate rule of law would have stated that "maritime jurisdiction over torts is limited to torts in which the vessels are in 'navigation.'" *Id.* at 367 (emphasis added).

¹¹³ *Id.* at 367. Because the principal interest of maritime jurisdiction is to protect maritime commerce, "that interest cannot be fully vindicated unless 'all operators of vessels on navigable waters are subject to uniform rules of conduct.'" *Id.* (citing *Foremost*, 457 U.S. at 675).

¹¹⁴ *Id.*

¹¹⁵ See *Sisson*, 494 U.S. at 365-67 n.4 (discussing divergent views taken by various circuits).

¹¹⁶ 485 F.2d 520 (5th Cir. 1973), *cert. denied sub nom. Chicot Land Co. v. Kelly*, 416 U.S. 969 (1974).

¹¹⁷ *Kelly*, 485 F.2d at 525. Following the *Foremost* decision, the Fifth Circuit in *Molet v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987), incorporated three additional factors to determine maritime nexus: (1) the impact of the event on maritime shipping and commerce; (2) the desirability of a uniform rule to apply to such matters; and (3) the need for admiralty "expertise" in the trial and decision of the case. *Molet*, 826 F.2d at 1426 [hereinafter *Molet I*]. The authority of these three additional factors was questioned in *Sisson*, where the Court pointed out that *Molet I* should be compared with *Molet v. Penrod Drilling Co.*, 872 F.2d 1221, 1224 (5th Cir.), *cert. denied*, 493 U.S. 1003 (1989) [hereinafter *Molet II*]. *Sisson*, 497 U.S. at 366 n.4. In *Molet II*, the court applied the four *Kelly* factors without expressly mentioning the extra factors identified in *Molet I*. *Molet II*, 872 F.2d at 1223. Moreover, the Fifth Circuit itself questioned the value of the additional factors when it wrote "we discern little difference between the two tests." *Palmer v. Fayard Moving & Transp. Corp.*, 930 F.2d 437, 440 (5th Cir. 1991).

or to criticize any of these tests finding that its trilogy of cases provided sufficient guidance.¹¹⁸

In practice, the lower courts have generally expanded the kinds of activities that fall within admiralty jurisdiction as a result of the new inquiry required by *Sisson*.¹¹⁹ By following *Sisson*'s directive to examine the general conduct rather than the specific circumstances of each incident, several courts have granted admiralty jurisdiction under factual settings where jurisdiction had been denied in the past.¹²⁰ The Third Circuit has adopted an approach which retains its traditional *Kelly*-type balancing test, subject to the revised inquiry demanded in *Sisson*.¹²¹ It is likely that other courts will similarly rely on existing balancing tests, subject to modifications based upon *Sisson*'s revised two-part analysis.

The question of whether torts involving gaming vessels meet the requirements laid down in *Sisson* depends on the type of gaming vessel involved and the cause of the injury. Torts that occur on gaming vessels in Category I will very likely meet the maritime nexus requirement.¹²² These vessels either navigate on a regular basis, or are capable of navigating on a regular basis but remain dockside for a variety of reasons.¹²³ Any tort occurring on a commercial vessel that is regularly used to

¹¹⁸ *Sisson*, 497 U.S. at 363-67.

¹¹⁹ For a discussion of the post-*Sisson* cases, see Matthew P. Harrington, *Almost Full Circle: Admiralty Jurisdiction Over Pleasure Craft*, 24 J. MAR. L. & COM. 453, 493-98 (1993).

¹²⁰ For example, in *Foster v. Peddicord*, 826 F.2d 1370, 1375 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), the Fourth Circuit ruled that the claim by a swimmer injured when diving from a moored recreational vessel did not involve a traditional maritime activity and therefore did not fall under admiralty jurisdiction. Although its facts were analogous, the *Bird* court refused to follow *Foster* and held that a maritime tort was present. *Bird*, 794 F. Supp. at 580. Although critical of the expansive nature of the new approach, the *Bird* court was convinced that *Foster* must give way to the analysis adopted in *Sisson*. *Id.*; see also *Windsor Mount Joy v. Brunswick Corp.*, 1992 AMC 1114 (D.N.J. 1991) (holding that water skier's injuries fell within admiralty jurisdiction despite contrary authority).

¹²¹ *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3rd Cir. 1991).

¹²² See *supra* notes 36-45 and accompanying text.

¹²³ See *supra* notes 36-44 and accompanying text.

transport passengers over navigable waters is governed by federal admiralty law.¹²⁴ Because gaming vessels in Category I were built for the purpose of transporting passengers over water, courts will likely treat these gaming vessels as they have traditionally treated cruise ships or sightseeing vessels.¹²⁵ Torts that occur on cruise ships and sightseeing vessels have been deemed maritime torts regardless of whether they take place when the vessel is actually engaged in navigation or while it is moored to the dock.¹²⁶ Even "slip and fall" cases aboard these vessels have consistently been deemed to meet the maritime nexus requirements for a maritime tort.¹²⁷

It is less clear, however, whether torts occurring aboard Categories II or III gaming vessels will be found to meet the maritime nexus requirement.¹²⁸ Because their design and purpose is more akin to floating platforms than to traditional cruise ships or sightseeing vessels, courts will scrutinize more

¹²⁴ See, e.g., *Morton v. De Oliveira*, 984 F.2d 289, 290 (9th Cir.) (involving passenger's claim that cruise line was liable for crew member's assault on open seas), *cert. denied*, 114 S. Ct. 289 (1993); *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1334 (11th Cir. 1984) (stating admiralty law governs where injury occurred upon ship in navigable waters), *cert. denied*, 470 U.S. 1004 (1985); see also *Leathers v. Blessing*, 105 U.S. 626, 626-27 (1882) (asserting that admiralty jurisdiction is proper even where vessel has completed voyage and is moored at destination).

¹²⁵ This observation is limited to the question of whether there is a maritime tort and does not necessarily imply that the vessel's employees will be deemed Jones Act seamen. See *infra* notes 184-306 and accompanying text.

¹²⁶ See *Palmer*, 930 F.2d at 440 (holding admiralty jurisdiction proper where passenger was injured while boarding sightseeing vessel); *Butler v. American Trawler Co.*, 887 F.2d 20, 21-22 (1st Cir. 1989) (holding same); *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40, 41 n.2. (S.D. Fla.) (holding same), *aff'd*, 808 F.2d 60 (1986); see also *Palmer v. Ribax*, 407 F. Supp. 974 (D. Fla. 1976) (discussing torts occurring on sightseeing vessels).

¹²⁷ See *Palmer*, 930 F.2d at 440 (citing *Taylor v. Kennedy Engine, Inc.*, 861 F.2d 127, 129-30 (5th Cir. 1988)) (finding maritime jurisdiction over action brought by seaman injured during course of duties by falling off defective ladder); *Monteleone v. Bahama Cruise Line*, 838 F.2d 63 (2d Cir. 1988) (finding admiralty jurisdiction where passenger fell down stairs aboard cruise ship).

¹²⁸ See *supra* notes 46-56 and accompanying text. It will be assumed for purposes of this article that gaming vessels in Category IV do not meet the maritime locality requirement and therefore are not subject to admiralty jurisdiction at least for purposes of bringing a maritime tort action. See *supra* notes 57-59, 83-88 and accompanying text.

closely any tort taking place on these floating structures.¹²⁹ Torts such as injuries caused by fire or by collision with another vessel will probably be deemed a maritime tort. Clearly, a fire aboard a commercial gaming vessel located on navigable waters has the potential to disrupt maritime commerce and is substantially related to traditional maritime activity.¹³⁰ Conversely, a garden-variety "slip and fall" injury or other injury unrelated to any navigation function is less likely to meet maritime nexus requirements.¹³¹ It is also possible that even if an injury of this kind were to marginally meet the nexus requirements, federal admiralty courts may apply state substantive law under the "maritime but local" doctrine.¹³² In the

¹²⁹ See *infra* notes 184-206 and accompanying text (discussing personal injury and wrongful death claims by seamen).

¹³⁰ There is no reason to distinguish a fire on a gaming vessel from a fire at a recreational boat marina, which has been held to be a maritime tort. See *Sisson*, 497 U.S. at 362 (recognizing fire as one of most serious hazards facing commercial vessels); see also *supra* notes 98-114 and accompanying text (discussing *Sisson*).

¹³¹ See *Molet I*, 826 F.2d at 1426 (denying admiralty jurisdiction where worker was killed while constructing derrick on floating barge). The *Molet I* court stated:

Although the vehicle upon which the accident occurred was a drilling barge, that fact is at most tangential. The barge was not complete or in navigation when the accident occurred, and the accident neither caused harm to the barge nor can be specifically attributed to the location of the derrick on a vessel. . . .

. . . .
The causation and type of injury involved in this case also appear to be unrelated to its occurrence on navigable waters. Every factor identified as a cause of the accident might have occurred as easily on land, and the injuries the parties suffered are indistinguishable from those arising out of similar land-based mishaps.

Id. at 1427; see also *Hall v. Zambelli*, 675 F. Supp. 1023, 1025 (S.D. W.Va. 1988) (denying admiralty jurisdiction where worker was injured during fireworks display on barge in navigable waters).

¹³² See *Palestina v. Fernandez*, 701 F.2d 438, 439 (5th Cir. 1983) (applying Louisiana law to "garden variety" tort claim though requirements for admiralty jurisdiction were met). The "maritime but local" doctrine allows federal admiralty courts to apply state substantive law in situations where legitimate and non-threatening state interests outweigh the need for the application of a uniform maritime law. See *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961) (describing process as "one of accommodation"); see also *Steclmet, Inc. v. Cariba Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986) (outlining analysis used to

end, any determination of admiralty jurisdiction on gaming vessels will be based on the same case by case balancing process that is employed by the courts for other varieties of maritime torts.¹³³

B. Are Gaming Vessels Truly "Vessels"?

Of considerable importance to any determination of admiralty jurisdiction is the question of vessel status. Under ordinary conditions, acts occurring "aboard a vessel will be presumed . . . to meet the maritime relationship requirement."¹³⁴ The definition of a "vessel" is not uniform and may shift depending on the maritime claim or federal statute involved.¹³⁵ For example, the definition of a "vessel" for purposes of liability for injury or death of seamen under the Jones Act is based upon specific criteria associated with that unique federal statute and may be different than the definition of "vessel" for other purposes.¹³⁶

The following discussion examines vessel status within the context of its use under general maritime law. Congress has adopted the general definition of the term "vessel" which developed under general maritime law¹³⁷ to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation by water."¹³⁸ Courts have developed certain criteria to determine whether a structure complies with this broad and rather vague definition

determine what law applies).

¹³³ See *supra* notes 110-17 and accompanying text.

¹³⁴ 1 SCHOENBAUM, *supra* note 60, § 1-6.

¹³⁵ See generally BENEDICT, *supra* note 60, § 161.

¹³⁶ For a discussion of vessel status under the Jones Act, see *infra* notes 215-306 and accompanying text.

¹³⁷ See *infra* note 138 and accompanying text. According to one commentator, "it is highly unlikely that Congress, in formulating a definition of a word of so immediate a connection with maritime law and so likely to recur in maritime legislation, could have intended materially to depart from the meaning under the general maritime law." BENEDICT, *supra* note 60, § 165.

¹³⁸ 1 U.S.C. § 3 (1988); see also *DiGiovanni v. Traylor Bros.*, 959 F.2d 1119, 1129-31 (1st Cir.) (listing 24 federal laws that incorporate this definition), *cert. denied*, 113 S. Ct. 87 (1992).

of a vessel, with the most important criteria being the purpose for which the structure was constructed and the business in which it is engaged.¹³⁹ Generally, to be considered a vessel, the craft must be a navigable structure intended for maritime transportation.¹⁴⁰ Vessel status will generally be denied if the transportation function is found to be incidental or not significant to the purpose of the vessel.¹⁴¹ This finding is usually made with regard to powerless floating structures with specialized functions that are more or less permanently fixed to shore.¹⁴²

Despite the extensive line of cases denying vessel status to many types of permanently moored floating structures, there is an equally extensive collection of cases that have found vessel status under similar circumstances. For example, powerless houseboats capable of being towed from one point to another

¹³⁹ See, e.g., *The Robert W. Parsons*, 191 U.S. 17, 30 (1903) (finding that canal boats that ply Erie Canal and Hudson River are vessels).

¹⁴⁰ BENEDICT, *supra* note 60, § 164. "It is not the form, the construction, the rig, the equipment, or means of propulsion that establishes the jurisdiction, but the purpose and business of the craft as an instrument of maritime transportation, that is to say, whether the craft is a navigable structure intended for maritime transportation." *Id.*; see also *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627 (1887) (denying recovery to salvor of sunken dry dock).

¹⁴¹ See, e.g., *Cookmeyer v. Louisiana Dept. of Highways*, 309 F. Supp. 881, 883 (E.D. La.) (finding no significant transportation function in pontoon bridge), *aff'd*, 433 F.2d 386 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971). In *Cope*, 119 U.S. at 627, the Court held that, "a fixed structure, such as [a] drydock, used for the purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water." See also *Keller v. Dravo Corp.*, 441 F.2d 1239, 1244 (5th Cir. 1971) (denying vessel status to floating dry-dock used for construction and attached to pier), *cert. denied*, 404 U.S. 1017 (1972).

¹⁴² See, e.g., *Evansville & Bowling Green Packet Co. v. Chero Cola Co.*, 271 U.S. 19, 22 (1926) (declaring permanently moored wharfboat not vessel because used as warehouse and office and not capable of navigation); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660-62 (9th Cir. 1992) (denying vessel status to converted liberty ship because permanently moored to dock and used as fish processing plant). Compare *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1000 (5th Cir.) (holding floating construction platform secured to dock by rope not vessel), *cert. denied*, 414 U.S. 868 (1973) with *Pleason v. Gulfport Shipbldg. Corp.*, 221 F.2d 621, 623 (5th Cir. 1955) (holding floating shrimp processing plant moored to dock by steel cable is vessel). See also BENEDICT, *supra* note 60, § 164 (citing cases); 1 SCHOENBAUM, *supra* note 60, §§ 1-6 (citing cases).

er,¹⁴³ permanently moored museum ships,¹⁴⁴ and non-propelled construction barges¹⁴⁵ have been held to be "vessels." Even vessels that have been out of operation for many years have been deemed "vessels."¹⁴⁶

There is little question that gaming vessels in Category I which are capable of navigating under their own power have vessel status.¹⁴⁷ Whether these vessels actually navigate on a regular basis or remain dockside is immaterial because they were clearly constructed for the purpose of transporting passengers over water and are capable of carrying out that purpose under their own power.¹⁴⁸ These gaming vessels have all of the traditional characteristics that courts use to determine vessel status, including a master and crew, running lights and other navigational aids, raked bows, lifeboats and life-saving equipment, and bilge-pumps.¹⁴⁹

A slightly more difficult problem is presented when the

¹⁴³ See *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968) (subjecting houseboat to maritime lien); *Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) (finding capacity for navigation).

¹⁴⁴ See *McCarthy v. Bark Peking*, 716 F.2d 130, 136 (2d Cir.) (ruling that four-masted sailing vessel used as maritime museum and entertainment hall constitutes vessel despite its rudder being welded in fixed position), *cert. denied*, 465 U.S. 1078 (1984); *Luna v. Star of India*, 356 F. Supp. 59, 66 (S.D. Cal. 1973) (holding that 19th century sailing ship permanently moored as maritime museum is vessel despite Coast Guard's determination that ship was "substantially a land structure").

¹⁴⁵ See *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957) (conferring vessel status upon dredge rarely used in transit); *Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1983) (holding powerless river barge is vessel); *Salgado v. M. J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975) (ruling that floating crane with no motive power is vessel).

¹⁴⁶ See *M/V Marifax v. McCrory*, 391 F.2d 909, 910 (5th Cir. 1968) (stating decommissioned navy ship "mothballed" for 15 years is vessel); *In re The Queen Ltd.*, 361 F. Supp. 1009, 1013 (E.D. Penn. 1973) (holding ship tied to dock with its propellers disconnected is vessel).

¹⁴⁷ See *supra* notes 36-45 and accompanying text.

¹⁴⁸ See *supra* notes 139-42 and accompanying text. This includes a vessel such as the permanently moored *President* in Biloxi, Mississippi. The *President* is capable of navigating under its own power, but would probably only be required to do so if necessary for safety or repair purposes.

¹⁴⁹ See *infra* notes 215-21 and accompanying text (discussing traditional factors used by courts to determine vessel status).

gaming vessel is a converted cruise ship or excursion vessel without motive power, such as those falling within Category II.¹⁵⁰ Despite its inability to navigate under its own power, a ship of this type retains its physical characteristics as a vessel and its residual capacity to engage in navigation. As a consequence, courts may grant vessel status as they have for museum ships and "mothballed" vessels.¹⁵¹ This finding is supported by the fact that the gaming vessel continues to be engaged in the business of accommodating passengers on navigable waters, although no longer transporting them from point to point.¹⁵²

Vessel status will be contested most frequently with Categories III and IV dockside gaming vessels in Mississippi.¹⁵³ These gaming vessels generally consist of specially constructed, multi-storied superstructures attached to a barge or group of barges. Although capable of being moved to other locations with the assistance of tugs, these structures are permanently fixed to the shore and are usually integrated into larger land-based development projects. The Coast Guard has certified these vessels to be permanently moored and not subject to inspection.¹⁵⁴ In addition, electrical power and other utilities are provided from shore-based sources.

There are strong legal and policy arguments against granting vessel status to dockside gaming vessels in Mississippi. Maritime transportation is clearly incidental to the primary mission of these floating structures. Instead, they can be viewed as floating extensions of land, which perform a function

¹⁵⁰ See *supra* notes 46-49 and accompanying text.

¹⁵¹ See *supra* note 146 and accompanying text.

¹⁵² For example, the court in *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930), stated "[w]hile her owners had not, at the time when the libel was filed, any present intention to use her for transportation purposes, [we] do not think that fact decisive. She was still a 'vessel' in [our] opinion within the admiralty jurisdiction." *Id.*; see also *infra* note 167 and accompanying text.

¹⁵³ See *infra* notes 270-84 and accompanying text (discussing cases where *Biloxi Belle* held not vessel for Jones Act purposes).

¹⁵⁴ Copies of all letters as of the time of this writing from the Coast Guard determining that specific gaming vessels are "permanently moored" and therefore not a "vessel" for inspection purposes are on file with the author.

that just as easily could be carried out in a land-based structure. Consequently, it can be argued that no significant purpose would be served by bringing gaming vessels of this type under the jurisdiction of federal admiralty courts unless these vessels are actually engaged in navigation at the time of the incident.¹⁵⁵

On the other hand, there are also valid arguments in favor of finding vessel status. Unlike land based structures, it is relatively easy for many dockside gaming vessels to disconnect from shore-side facilities and to sail away on short notice.¹⁵⁶ In fact, until very recently, all gaming vessels in coastal Mississippi were required to submit a hurricane evacuation plan attesting to the fact that the vessel was capable of being moved to a safer location within hours of being notified of an approaching storm.¹⁵⁷

Furthermore, because these gaming vessels float, they are

¹⁵⁵ One policy reason for having special admiralty procedures is to provide some measure of protection to creditors, who would not be willing to furnish credit to vessels, and to tort victims, who may not receive redress for injuries, should a vessel sail out of port never to return. Because permanently moored gaming vessels are not as mobile as traditional vessels, the need for special admiralty procedures is greatly diminished. *But see infra* notes 157-59 (offering policy arguments in favor of granting admiralty jurisdiction over gaming vessels).

¹⁵⁶ The primary function of a vessel is to move from place to place. Consequently, many of the procedural and substantive rules imposed under federal admiralty law were specifically created to protect the rights of claimants who may be deprived of a remedy as a consequence of a vessel leaving the jurisdiction on short notice.

¹⁵⁷ It should be noted that the Mississippi Gaming Commission carefully scrutinizes the hurricane evacuation plans of all dockside gaming vessels along the Mississippi Gulf Coast prior to granting a gaming license. All but one of the gaming vessels that submitted plans to the Commission indicated that they would be able to evacuate to a safer site within 48 hours of receiving an evacuation notice. Several claimed to be able to evacuate in less than 12 hours. *See CASINO VESSEL HURRICANE EVACUATION ALTERNATIVES, supra* note 15, at 46-47. Some government officials and other observers were skeptical of the proposed evacuation plans and noted that moving all of the gaming vessels at once during a hurricane would be dangerous and unrealistic. The Gaming Commission has recently changed the policy so that all gaming vessels must remain moored in place and be able to withstand winds of 155 miles per hour and tidal surges of 15 feet. Lee Ragland, *Moorings Mandatory for Coast Casinos*, CLARION-LEDGER (Jackson, Miss.), Oct. 14, 1994, at B5.

susceptible to many of the same perils and hazards as more traditional vessels. For example, there is the possibility, especially if they are located on a busy commercial waterway, that another vessel may collide with a permanently moored casino causing it to sink or capsize.¹⁵⁸ In the event of a shipboard fire or explosion, passengers and employees will likely have a more difficult time escaping from a gaming vessel than from a comparable land-based casino. Moreover, a fire boat may be required to put out the blaze rather than shore-based fire fighting equipment. In addition, gaming vessels, unlike land-based casinos, pose a unique threat to the marine environment and to other marine users. Discharges of oil, chemicals or sewage, even in small quantities, may have significant environmental and economic impacts. It is established that any pollution incident causing damage to fisheries and navigable waters falls within admiralty jurisdiction.¹⁵⁹

A survey of the reported decisions involving permanently moored floating structures, such as show boats, floating restaurants, and floating hotels which are similar to gaming vessels, reveals that courts have had difficulty in determining whether these structures constitute "vessels."¹⁶⁰ In *Hayford v. Doussony*, a navy gunboat was converted to a floating amusement and dance hall called "The Pirate Ship."¹⁶¹ Despite the

¹⁵⁸ If the damaged gaming vessel is located in navigable waters of the United States, the vessel owner has to comply with the duties imposed under The Federal Wreck Removal Act, 33 U.S.C. §§ 409-415 (1988). Any liability for failure to comply with this Act will be based on general maritime tort principles. See Jerome C. Scowcroft, *Wreck Removal: An Overview and Recent Developments*, 68 TUL. L. REV. 311, 312-16 (1994) (discussing tort liability for failure to comply with Act).

¹⁵⁹ See *In re Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981) (recovering cleanup costs from vessel owners for oil spill); *National Sea Clammers Ass'n v. New York*, 616 F.2d 1222, 1235 (3d Cir.) (allowing action against sewage discharge), *cert. denied*, 449 U.S. 917 (1980); *Maryland Dep't of Nat. Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1064 (D. Md. 1972) (holding discharge of oil actionable).

¹⁶⁰ See *infra* notes 161-83 and accompanying text.

¹⁶¹ 32 F.2d 605 (5th Cir. 1929). *The Pirate Ship* was secured to the dock at New Orleans by cables. *Hayford*, 32 F.2d at 605. A permanent gangway covered by a wooden structure extended from the wharf to the hull. *Id.* Electrical wires

fact that the floating dance hall had been moored for less than four months and had been towed twice prior to the proceedings, the Fifth Circuit, in denying admiralty jurisdiction, stated that "[t]he Pirate Ship was not used, or intended to be used, to carry freight or passengers from one place to another, was not an instrument of navigation or commerce, and performed no function that might not have been performed as well by a floating stage or platform permanently attached to the land."¹⁶²

Vessel status was also denied in *The Hendrick Hudson*.¹⁶³ In this early decision, a steamboat stripped of her boiler, engine, and paddle-wheels was converted into a floating saloon and hotel.¹⁶⁴ The court ruled that a claim for marine salvage did not fall under admiralty jurisdiction because "[t]he service did not fairly and legitimately concern any right or duty which appertained to commerce or navigation or to a structure engaged in commerce or navigation."¹⁶⁵ However, the court added that "[w]hether the structure in question would or would not be liable in rem, in the admiralty, for a tort or injury committed by it on navigable waters, depends on different considerations, and is not necessarily determined by holding not to be liable in this suit."¹⁶⁶

With the exception of *Hayford* and *Hendrick Hudson*, vessel status has been awarded in the vast majority of cases involving permanently moored show boats and floating restaurants.¹⁶⁷ Most of these cases concerned maritime liens for necessary services or supplies. In two of these cases, courts denied maritime liens, but expressly found permanently moored restaurants to be vessels for purposes of admiralty jurisdiction. In *In re River Princess Corp.*,¹⁶⁸ the bankruptcy court ruled that, "if a craft is capable of being towed from one place to another

and water pipes connected the floating structure to the shore. *Id.*

¹⁶² *Id.*

¹⁶³ 11 F. Cas. 1085 (S.D.N.Y. 1869) (No. 6355).

¹⁶⁴ *Hendrick Hudson*, 11 F. Cas. at 1085.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See BENEDICT, *supra* note 60, § 164, at 10-9.

¹⁶⁸ 126 B.R. 837 (Bankr. S.D.N.Y. 1991).

on navigable waters, even as a barge, it will qualify as a vessel."¹⁶⁹ Similarly, in *Arques Shipyards v. The S.S. Charles Van Damme*,¹⁷⁰ the court found a floating restaurant "permanently connected to the mainland" to be a vessel, but denied a maritime lien because services and materials provided by the creditor were not used "for its purpose of facilitating the use of the vessel in navigation."¹⁷¹ Other courts have granted vessel status to "showboats" without qualification.¹⁷²

The theoretical underpinning of the cases that deal with permanently moored show boats and floating restaurants are difficult to discern. However, the rationale of these decisions appears to rest primarily on the degree of permanence that the vessel has to the land.¹⁷³ This criteria is to be judged not by

¹⁶⁹ *River Princess*, 126 B.R. at 839. The court, in determining that the River Princess was a vessel, stated "[t]he fact that materials and labor are furnished to a vessel which is within the admiralty jurisdiction is not conclusive in ascertaining if a maritime lien arose." *Id.*

¹⁷⁰ 175 F. Supp. 871 (N.D. Cal. 1959).

¹⁷¹ *Arques Shipyards*, 175 F. Supp. at 872. The court found as follows:

[I]t seems clear that admiralty jurisdiction does not depend on respondent's classification when in use as a restaurant, but rather on (1) whether the materials furnished and the services performed were capable of giving rise to a maritime lien, or (2) the respondent's status at such time. The fact that services and materials are furnished to a *vessel* which is within the admiralty jurisdiction is not necessarily determinative of whether or not a maritime lien arises.

Id. *Arques Shipyards* was incorrectly cited as holding that the floating restaurant was not a vessel in *In re Harbor Lights Marina Inc.*, 146 B.R. 963, 970 (Bankr. S.D. Ohio 1992).

¹⁷² A number of other "showboat" cases granted vessel status without qualification. For example, in *The Showboat*, the court concluded that a schooner tied to a wharf and used as a restaurant and dance hall was a vessel although it was equipped for sailing and capable of being towed. *The Showboat*, 47 F.2d at 287; see also *Clinton Bd. of Park Comm'rs v. Claussen*, 410 F. Supp. 320, 323 (S.D. Iowa 1976) (declaring sternwheeler converted to powerless showboat and museum is vessel); *The Club Royale*, 13 F. Supp. 123, 124 (D.N.J. 1935) (granting vessel status to former showboat moored to dock for use as restaurant and dance hall); *The Ark*, 17 F.2d 446, 449 (S.D. Fla. 1926) (holding moored houseboat converted to supper club and dance hall is vessel); *City of Pittsburg*, 45 F. 699, 700 (W.D. Pa. 1891) (ruling that steamboat converted into dance hall is vessel).

¹⁷³ See *Harbor Lights Marina*, 146 B.R. at 970 (stating that "the definition of the term 'vessel' turns on the permanence of the attachment of the particular boat to the shore"); see also *In re Queen Ltd.*, 361 F. Supp. 1009, 1013 (E.D. Pa.

the intentions of the owners to keep the vessel permanently moored, but by its physical capacity to be moved.¹⁷⁴ In all of the cases where vessel status was found, the floating structures were capable of being disconnected from their shore based facilities and moved with the aid of tugs on relatively short notice.¹⁷⁵ Moreover, although refitted to serve their new purposes, these vessels retained their seaworthy condition and were capable of returning to maritime navigation or commerce.¹⁷⁶

The major weakness of using the degree of permanency to shore as the primary criteria for vessel status is its imprecision and subjective quality.¹⁷⁷ For example, in *Hayford*, a floating dance hall that had been towed into position and later moved

1973) (remarking that existence of maritime lien depends on how long structure has been attached to land).

¹⁷⁴ *The Queen Ltd.*, 361 F. Supp. at 1013. According to the court:

Rather than having the existence of a lien depend on the ethereal quality of the owners' intent to use the ship in commerce and navigation, more uniform results are likely to be achieved, continuing along the line of the "showboat" cases. [In these cases,] the existence of a lien is dependent upon the degree of permanence of the attachment of the structure to the land.

Id. (citations omitted).

¹⁷⁵ Granting vessel status, the court in *The Club Royale* distinguished *Hayford* by pointing out the following:

The present case may be distinguished from the so-called "Pirate Ship Case" and others cited by petitioner, in that the S.S. Club Royale floated, and was moored to the dock in the same manner as any other vessel would be moored. This was not so in the case of *The Pirate Ship*, which the court says was secured, "not like an ordinary ship, but with cables and clamps, the cables having eight or ten turns around clusters of piling. A permanent gangway was built ashore, with a house over it extending to the wharf, the gang plank being secured to the hull with seven or eight one-inch pins."

The Club Royale, 13 F. Supp. at 126.

¹⁷⁶ See *Hayford*, 32 F.2d at 605 (denying admiralty jurisdiction because ship was old, dilapidated and at considerable expense had been refitted as amusement or dance barge); *Hendrick Hudson*, 11 F. Cas. at 1086 (refusing vessel status to ship described as "a sunken hulk, without motive power, not used in commerce in any manner").

¹⁷⁷ The discretionary quality of vessel status was noted in *The Showboat*, 47 F.2d at 287, where the court stated that "each case depends on its particular facts; and structures shade off from what is obviously a vessel to what is obviously not."

twice within a four month period was denied vessel status.¹⁷⁸ Because it was moored with cables and clamps, had a permanent gangway and was equipped with electrical wires and water pipes from shore, it was ruled too permanently attached to shore to be a vessel.¹⁷⁹ In contrast, under a set of facts that may only be distinguished by the lack of a permanent gangway, the court in *In re Harbour Lights Marina, Inc.* found a floating restaurant to lack permanency and granted vessel status.¹⁸⁰

Of course, there will be circumstances in which vessel status is clearly precluded. The most obvious examples include gaming vessels that fall under Category IV which are berthed in mooring basins physically separated from navigable waters.¹⁸¹ On the other hand, it is not so clear whether the dock-side gaming vessels in Category III are sufficiently permanent to warrant exclusion from vessel status.¹⁸² Any determination of vessel status for these gaming vessels will depend on case by case determinations using criteria such as: the ease in which a mooring system and shore-based utilities can be detached; the length of time that the vessel has been berthed in the same location; the seaworthiness of the vessel; and past actions taken by the owner that evidences vessel status.¹⁸³

¹⁷⁸ *Hayford*, 32 F.2d at 605.

¹⁷⁹ *Id.* at 606.

¹⁸⁰ *Harbour Lights*, 146 B.R. at 970. Specifically, the court found:

In the instant case, it is not disputed that the Craft was capable of being towed. The Craft had removable gangplanks and was tied to the river bank with mooring cables and ropes. These cables and ropes, as well as the Craft's electric and plumbing cables, were easily detachable. Further, [one witness] testified in his affidavit that the Craft was capable of being used as a barge, and that it could function as a tow boat. The Craft, in fact, had been towed three times since being converted to a restaurant, the last time after it was sold at auction.

Id.

¹⁸¹ See *supra* notes 57-59 and accompanying text (describing Category IV gaming vessels).

¹⁸² See *supra* notes 50-56 and accompanying text (discussing Category III gaming vessels).

¹⁸³ For example, in *The Club Royale*, 13 F. Supp. at 126, the court indicated that the best evidence of vessel status was the inconsistent past actions of a receiver who held a preferred ship mortgage. The court pointed out that in earlier

IV. PERSONAL INJURY AND WRONGFUL DEATH CLAIMS BY EMPLOYEES

Having generally examined how maritime tort jurisdiction is obtained, and how the courts will likely apply the general definition of vessel status to gaming vessels, we should now turn our attention more specifically to the kinds of maritime tort claims that are likely to arise on gaming vessels. Even if admiralty jurisdiction is found, this does not necessarily mean that a plaintiff will be entitled to all remedies available under federal law. Many maritime remedies are reserved for specific classes of claimants either by statute or under general maritime law. For example, different remedies are available depending on whether the claimant is an employee with "seaman" status, a harbor worker, or a gaming vessel patron. The following sections examine several classes of claimants.

proceedings the receiver had attempted to characterize the ship as a vessel in order to obtain priority over other lienholders. *Id.* However, when he did not receive priority, he requested that the final decree be re-opened because the floating restaurant was not a vessel and the admiralty court lacked subject matter jurisdiction. *Id.* With respect to these inconsistent positions, the court stated:

[The conclusion] that it was a vessel within the maritime law was best proven by the actions of the intervener in his various transactions concerning her, and not by his present words. It is inescapable that to him the *S.S. Club Royale* was a vessel within the maritime jurisdiction up to the time he knew that his alleged preferred ship mortgage would not obtain for him priority over all other claimants; then she was no longer a vessel.

Id. This rationale may not be limited to holders of preferred ship mortgages, and a similar argument may be made whenever a gaming vessel owner has been advantaged by asserting vessel status in the past. For example, if a gaming vessel owner has received reductions in insurance premiums by relying on the liability protections contained in the Limitation of Shipowner's Liability Act, 46 U.S.C. §§ 181-189 (1983), a later argument denying vessel status may be foreclosed.

A. Seamen's Remedies

Gaming vessel employees who have "seaman" status and are injured or killed in the service of a ship have three important remedies against their employers.¹⁸⁴ Before examining in detail what is required for an employee to achieve "seaman" status, it may be helpful to summarize these three remedies.

1. Jones Act Negligence¹⁸⁵

The Jones Act provides a remedy for personal injury or wrongful death for all seamen.¹⁸⁶ The Act is not limited to injuries that occur on navigable waters as long as, at the time of the incident, the seaman was engaged in work pursuant to his employer's orders.¹⁸⁷ To recover under the Act, the seaman must prove employer negligence.¹⁸⁸ Courts traditionally have interpreted the Jones Act as remedial in nature and, consequently, have imposed liability on maritime employers, upon a showing of only "slight negligence."¹⁸⁹ A growing number of

¹⁸⁴ Although there are several other statutory and common law remedies, the three most important are: Jones Act negligence, unseaworthiness, and the right to maintenance and cure. 1 SCHOENBAUM, *supra* note 60, § 43-1. For a discussion of these three remedies, see *infra* notes 185-204 and accompanying text.

¹⁸⁵ 46 U.S.C. § 688 (1988).

¹⁸⁶ *Id.* The Jones Act incorporates the protections provided to railroad employees under the Federal Employer's Liability Act, 46 U.S.C. § 688 (1988) [hereinafter FELA], and extends them to seamen.

¹⁸⁷ *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 131 (1959) (allowing recovery for injuries sustained by seaman when catwalk collapsed); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 373 (1957) (permitting Jones Act recovery for seaman injured by explosion in shore based shed).

¹⁸⁸ The Jones Act incorporates the liability standard contained in FELA, which permits recovery against an employer:

[for] such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51 (1988).

¹⁸⁹ *See, e.g., Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993) (applying "slight negligence" standard); *Alvarez v. J. Ray McDermott & Co.*, 674

commentators have begun to criticize some courts for imposing a higher degree of care on maritime employers than that imposed on other employers, and believe that the Jones Act merely provides a seaman-plaintiff with an easier task of proving causation and sufficiency of the evidence.¹⁹⁰ Regardless of the outcome of this debate, there are significant incentives for a seaman-plaintiff to bring an action under the Jones Act rather than a common law negligence action.¹⁹¹

2. Unseaworthiness

A seaman may recover damages from a vessel owner for injuries caused by a defective condition of a ship, its equipment or appurtenances.¹⁹² In addition, members of the crew are also warranted as being seaworthy, and vessel owners may be held liable for crew assaults or incompetence.¹⁹³ To satisfy the

F.2d 1037, 1042 (5th Cir. 1982) (holding same); *Allen v. Seacoast Prod., Inc.*, 623 F.2d 355, 361 (5th Cir. 1980) (holding same).

¹⁹⁰ See generally 1 SCHOENBAUM, *supra* note 60, at 261-64; Robert Force, *Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care?"*, 25 J. MAR. L. & COM. 1 (1994); Brian J. Miles, *The Standard of Care in a Seaman's Personal Injury Action—Has the Jones Act Been Slighted?*, 13 TUL. MAR. L.J. 79, 90 (1988).

¹⁹¹ For instance, according to one commentator:

[Those] who have analyzed the evolution of the FELA and Jones Act, as those statutes have been interpreted by the Supreme Court, have concluded that a plaintiff-employee who brings an action under these statutes has a better chance of getting his case to a jury and of keeping a jury award compared to those plaintiffs who bring common law negligence actions and that the causation requirement is less demanding than that required in common law tort cases.

Force, *supra* note 190, at 4; see also Beer, *supra* note 25, at 381 (noting advantages of filing action under these statutes).

¹⁹² *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545 (1960) (involving claim that slippery rail made ship unseaworthy); *The Osceola*, 189 U.S. 158, 175 (1903) (involving claim that gangway made ship unseaworthy).

¹⁹³ See *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 339 (1955) (comparing belligerent seamen with "[a] hull with a latent defect"). However, absent a continuous course of conduct, a vessel will not be held unseaworthy for a single isolated act by a crew member. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500 (1971) (holding that to find individual act of negligence as rendering ship unseaworthy would subvert fundamental distinction between seaworthiness and negligence).

warranty of seaworthiness, a vessel is not required to be able to weather every conceivable storm or peril at sea, but must merely be reasonably fit for its intended use.¹⁹⁴ The obligation to maintain a seaworthy vessel is non-delegable and is independent of general negligence principles.¹⁹⁵

Only seamen are owed a warranty of seaworthiness.¹⁹⁶ Passengers, visitors or other persons who are aboard the vessel are not entitled to the benefits of the warranty.¹⁹⁷ Moreover, the warranty will not apply if the vessel is taken out of navigation for extended repairs or is "mothballed."¹⁹⁸ Whether permanently moored gaming vessels fall within the scope of this rule is unclear.¹⁹⁹

¹⁹⁴ *Trawler Racer*, 362 U.S. at 550.

¹⁹⁵ *Id.* at 549. Furthermore, the obligation to maintain a seaworthy vessel is absolute even in the absence of knowledge by the owner or master. See *Davis v. Hill Eng'g, Inc.*, 549 F.2d 314, 330 (5th Cir. 1977) (finding vessel unseaworthy despite owner's ignorance of slippery deck); *Trawler Racer*, 362 U.S. at 549 (holding knowledge of slippery railing unnecessary for purposes of unseaworthiness).

¹⁹⁶ *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959).

¹⁹⁷ See *Kermarec*, 358 U.S. at 629 (holding guest of crew member not covered by warranty of seaworthiness).

¹⁹⁸ See *Dean v. United States*, 418 F.2d 1236, 1239 (9th Cir. 1969) (imposing no duty of seaworthiness on owner of "dead ship"), *cert. denied*, 398 U.S. 905 (1970); *Roper v. United States*, 368 U.S. 20, 24 (1961) (refusing to extend warranty of seaworthiness where vessel not "in navigation"); *West v. United States*, 361 U.S. 118, 121-22 (1959) (finding no duty where ship was in repair "to make her seaworthy"). Furthermore, the court in *Dean* found no duty of seaworthiness where:

[d]uring the work and on the dates of the accidents, the ship had no power of its own. All power and other services including steam, water, communications, etc., were furnished to the ship from the shore. The ship was unable to move on its own power or even to steer itself if towed.

Dean, 418 F.2d at 1238.

¹⁹⁹ One distinction between the vessels in *West*, *Roper*, and *Dean* and gaming vessels is the fact that gaming vessels continue to remain in commercial operation rather than being taken out of commercial use by being dry-docked or mothballed.

3. Maintenance and Cure

A seaman has a right to receive food, lodging and medical services if he falls ill or becomes injured while in the service of his ship.²⁰⁰ The value of this remedy lies primarily in the fact that an employer must take all reasonable steps to ensure that the sick or injured seaman receives adequate care and treatment regardless of fault, negligence or causation.²⁰¹ Consequently, even if there is no evidence of Jones Act negligence or unseaworthiness, an action for maintenance and cure may still be available. If an employer breaches his duty to provide maintenance and cure, he may be held liable for all damages available in tort, including punitive damages and attorney's fees.²⁰² In addition to maintenance and cure, a seaman is also entitled to receive unearned wages that he would have earned had he completed the contractual terms of his employment.²⁰³ If the seaman is able to terminate his employment at will, as would likely be the case with most gaming vessel employees, he may only recover unearned wages for the single voyage on which he was engaged at the time of sickness or injury.²⁰⁴ Maintenance and cure may be denied if the seaman's sickness

²⁰⁰ Maintenance and Cure has ancient roots extending back to the earliest maritime law digests and sea codes. Its origin in the United States was defined to a large extent by two judicial decisions authored by Justice Joseph Story: *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047), and *Reed v. Canfield*, 20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641). See George W. Healy III, *Remedies for Maritime Personal Injury and Wrongful Death in American Law: Sources and Development*, 68 TUL. L. REV. 311, 313-23 (1994) (discussing origin of maintenance and cure).

²⁰¹ *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).

²⁰² *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984).

²⁰³ *Smith v. Atlas Off-shore Boat Serv.*, 653 F.2d 1057, 1064 (5th Cir. 1981).

²⁰⁴ See, e.g., *Reed v. American S.S. Co.*, 773 F. Supp. 991, 994 (E.D. Mich. 1991) (stating seamen employed on vessel operating on Great Lakes and able to leave their employment-at-will may only recover unearned wages for specific voyage they were engaged in at time of injury) *aff'd in part, vacated in part sub nom.* *Blaney v. American S.S. Co.*, 990 F.2d 885 (6th Cir.), *cert. denied*, 114 S. Ct. 346 (1993).

or injury is a result of "willful misconduct."²⁰⁵ Traditional instances of "willful misconduct" include intoxication, venereal disease, fighting, and intentional misrepresentation of an existing medical condition.²⁰⁶

B. Legal Test for Seaman Status

The legal test used to determine "seaman" status is the same regardless of whether a claim is brought under Jones Act negligence, unseaworthiness, or maintenance and cure.²⁰⁷ In fact, it is permissible, and quite common, for seamen to combine the three remedies in one cause of action.²⁰⁸

The leading case dealing with seaman status is *McDermott Int'l, Inc. v. Wilander*.²⁰⁹ In *Wilander*, the Supreme Court asserted that:

[t]he key to seaman status is an employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. In this regard, we believe that the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.²¹⁰

By requiring that a worker merely contribute to the overall mission or function of the vessel rather than to its more specific transportation function, *Wilander* disapproved of the tests used in the majority of circuits and significantly increased the num-

²⁰⁵ *Warren v. United States*, 340 U.S. 523, 528 (1951).

²⁰⁶ See generally 1 SCHOENBAUM, *supra* note 60, at 299; GILMORE & BLACK, *supra* note 60, at 287-92.

²⁰⁷ *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984).

²⁰⁸ *Cooper v. Diamond M Co.*, 799 F.2d 176, 179 (5th Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987).

²⁰⁹ 498 U.S. 337 (1991).

²¹⁰ *Wilander*, 498 U.S. at 355 (citations omitted).

ber of workers that may be granted seaman status.²¹¹ For example, it is now clear in the wake of *Wilander* that bartenders, waitresses, cooks, dealers, security guards and other employees who perform a substantial portion of their work aboard a gaming vessel in navigation will be granted seaman status.²¹² Although *Wilander* liberalized the kinds of work that qualify for seaman status, it did not address the test for determining whether a floating structure is a "vessel in navigation." This vessel requirement remains an essential component of seaman status and has been the subject of considerable litigation in the lower federal courts.²¹³ Most of these cases have involved the question of whether a particular floating structure is a "vessel in navigation" for purposes of seaman status under the Jones Act.²¹⁴

²¹¹ According to one commentator, *Wilander* rejected the tests used in the First, Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits, which required workers to aid in the navigation purpose in order to achieve seaman status. 1 SCHOENBAUM *supra* note 60, at 203; *see also* Allbritton, *supra* note 25, at 375-77 (discussing seamen status after *Wilander*). The only test left standing after *Wilander* is the Fifth Circuit's test developed in the case of *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). For a discussion of *Robison*, *see infra* notes 216-19 and accompanying text.

²¹² One commentator has noted:

Now that *Wilander* has determined that a worker can be a seaman without aiding the transportation function of the vessel, this requirement, although expressly confirmed by the Supreme Court, is of only featherweight significance. It is difficult to imagine a case in which a worker performs substantial work aboard a vessel without contributing to its mission.

1 SCHOENBAUM, *supra* note 60, at 209.

²¹³ For an analysis of these cases, *see* Allbritton, *supra* note 25, at 392-402; Beer, *supra* note 25, at 93-106; Engerrand & Bale, *supra* note 24, at 478-90; Robertson, *supra* note 24, at 93-106.

²¹⁴ 46 U.S.C. § 688 (1982).

C. Vessel Status Under the Jones Act

During the 1950s, the Supreme Court began the process of liberalizing the definition of "vessel" for purposes of the Jones Act.²¹⁵ In 1959, the Fifth Circuit further expanded the concept of vessel status in *Offshore Co. v. Robison*,²¹⁶ when it allowed the jury to categorize oil field workers on submersible drilling platforms as seamen aboard vessels in navigation.²¹⁷ In the decades following *Robison*, vessel status has been liberally applied and courts have generally sent marginal determinations to the jury.²¹⁸ This liberal view of vessel status has resulted in an avalanche of Jones Act claims in the nation's federal district courts.²¹⁹ One observer found that during the period between 1975 and 1985 roughly 13,000 Jones Act cases were filed in the Eastern District of Louisiana alone.²²⁰ This figure represented approximately one-quarter of the civil ac-

²¹⁵ See *Butler v. Whiteman*, 356 U.S. 271, 271-72 (1958) (per curiam) (applying broad reading to term "vessel"); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 373 (1957) (holding same); see also *Texas Co. v. Gianfala*, 350 U.S. 879, 879 (1955) (per curiam) (remanding lower court's decision which denied vessel status). For a discussion of the importance of these cases see Beer, *supra* note 25, at 393-97.

²¹⁶ 266 F.2d 769 (5th Cir. 1959).

²¹⁷ *Robison*, 266 F.2d at 780-81. The *Robison* Court asserted:

[e]xpansion of the terms "seaman" and "vessel" are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. . . . The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico.

Id. at 780.

²¹⁸ See *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978) (stating "submission of Jones Act claims to a jury requires a very low evidentiary threshold; even marginal claims are properly left for jury determination"), *cert. denied*, 441 U.S. 923 (1979); see also 1 SCHOENBAUM, *supra* note 60, at 215 (discussing liberal application of vessel status).

²¹⁹ *Robison* is generally recognized as the seminal seaman status case of the last 35 years. See Allbritton, *supra* note 25, at 375 (discussing importance of *Robison*).

²²⁰ Beer, *supra* note 25, at 400.

tions filed in that court during that time period.²²¹

By the mid-1980s, the Fifth Circuit recognized the need to develop more specific criteria by which courts could rule on vessel status as a matter of law. While conceding that the term "vessel" is not susceptible to precise definition, it developed what has become the generally accepted definition of a "Jones Act vessel" in *Bernard v. Binnings Constr. Co.*²²² Underlying this definition is a recognition that Jones Act vessels have traditionally been designed or utilized for "transportation of passengers, cargo or equipment from place to place across navigable waters."²²³ However, the court noted that this does not mean that special purpose structures far removed from traditional seagoing ships and barges should automatically be denied vessel status.²²⁴ Instead, the court determined the most important consideration to be the "the purpose for which the craft is constructed and the business in which it is engaged."²²⁵ The *Bernard* court suggested that structures which were deemed "floating work platforms" rather than Jones Act vessels shared three common characteristics:

(1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.²²⁶

Moreover, because direct evidence of the subjective purpose of a

²²¹ *Id.* In addition, the total number of Jones Act claims in the five states bordering the Gulf of Mexico "ranges upward toward six figures." *Id.*

²²² 741 F.2d 824, 829 (5th Cir. 1984).

²²³ *Bernard*, 741 F.2d at 828-29 (citing *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1002 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973)).

²²⁴ *Id.* The court noted that the size of the structure, the permanence of its fixation to the shore or the bottom, and its capability to move across navigable waters are not conclusive of vessel status. *Id.* at 829.

²²⁵ *Id.* (citing *Blanchard v. Engine & Gas Compressor Servs., Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978)).

²²⁶ *Id.* at 831.

designer or builder of a floating structure is usually not available, the court indicated that focus be placed on six navigational indicia: (1) navigational aids; (2) a raked bow; (3) lifeboats and other lifesaving equipment; (4) bilge pumps; (5) crew quarters; and (6) registration as a vessel with the Coast Guard.²²⁷

The Fifth Circuit further refined its definition in *Johnson v. Odeco Oil and Gas Co.*,²²⁸ and *Ducrepont v. Baton Rouge Marine Enterprises*.²²⁹ *Johnson* set forth three additional indicia of vessel status: (1) intentions of the owner to move the structure on a regular basis; (2) ability of the submerged structure to be refloated despite years of corrosion and deterioration; and (3) the length of time the structure has remained stationary.²³⁰ *Ducrepont* questioned the relevance of original design or purpose as a factor in determining vessel status, and instead thought it more appropriate to focus on current use.²³¹ The barge in *Ducrepont* was designed and constructed as a cargo vessel but had always been used as a floating platform for the purpose of cleaning, repairing and fleeting barges, and had never been moved from its original location.²³² The court asserted that to determine vessel status based on original purpose rather than current use would produce an "absurd result" not foreseen in *Bernard*.²³³

In practice, the definitions provided in *Bernard*, *Johnson*, and *Ducrepont* remain problematical, and courts continue to have difficulty distinguishing barges which are Jones Act vessels from those which are merely work platforms. The unsatisfactory and arbitrary nature of vessel status determinations

²²⁷ *Id.* at 832 n.25.

²²⁸ 864 F.2d 40, 43 (5th Cir. 1989).

²²⁹ 877 F.2d 393, 395 (5th Cir. 1989).

²³⁰ *Johnson*, 864 F.2d at 43.

²³¹ *Ducrepont*, 877 F.2d at 395.

²³² *Id.* at 394-95.

²³³ *Id.* at 395. In *DiGiovanni v. Traylor Bros.*, 959 F.2d 1119, 1124 (1st Cir.), cert. denied, 113 S. Ct. 87 (1992), the court adopted the Fifth Circuit's *Ducrepont* "current use" test. *DiGiovanni* held that notwithstanding its original design or purpose, if a barge is used currently or primarily as a work platform, then it should not retain its vessel status under the Jones Act. *DiGiovanni*, 959 F.2d at 1124.

has been made clear in several recent Fifth Circuit cases. For example, in *Gremillion v. Gulf Coast Catering Co.*²³⁴ and *Ellender v. Kiva Constr. and Eng'g, Inc.*,²³⁵ the Fifth Circuit affirmed summary judgments denying vessel status for purposes of the Jones Act. However, in *Sharp v. Johnson Bros. Corp.*²³⁶ and *Ducote v. V. Keeler & Co.*,²³⁷ summary judgments were reversed on the ground that a reasonable jury would have found vessel status.

Gremillion involved a quarterboat barge with no means of self-propulsion that was used as a "floating hotel" to house oil workers who worked in inland and shallow offshore waters.²³⁸ The barge had been "towed to its Timbalier Bay location about six months prior to the accident, partially sunk into a shore-side mud bank, and affixed by lines to a dock" where it remained stationary during the six month period prior to the accident.²³⁹ Despite acknowledging that the barge met seven of the nine indicia listed in *Johnson*, the court found it not to be a vessel.²⁴⁰ It stated that the factors cited in *Johnson* should "not be applied mathematically," and that the barge shared "sufficient traits with the family of fixed platforms and floating work barges which were not covered by the Jones Act."²⁴¹ Furthermore, the court found the barge's transportation function to be "purely incidental to its primary mission of providing living facilities to workers in relatively shallow waterways."²⁴²

Similarly, the court in *Ellender* refused to find vessel status for a four-barge platform configuration containing a mobile crane and other equipment used to drive piles for the construction of an offshore oil rig.²⁴³ The barges were not self-propelled and at the time of the accident were anchored by spuds

²³⁴ 904 F.2d 290, 294 (5th Cir. 1990).

²³⁵ 909 F.2d 803, 807 (5th Cir. 1990).

²³⁶ 917 F.2d 885, 889 (5th Cir. 1990).

²³⁷ 953 F.2d 1000, 1007 (5th Cir. 1992).

²³⁸ *Gremillion*, 904 F.2d at 291.

²³⁹ *Id.*

²⁴⁰ *Id.* at 294. The barge lacked bilge pumps and Coast Guard registration. *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Ellender*, 909 F.2d at 807.

in calm water.²⁴⁴ Despite evidence that a number of *Johnson* factors had been met, including the fact that the barge had living quarters for the crew and was frequently moved several feet after each row of pilings was driven, the court emphasized that the barge was being used for non-traditional purposes, and stated:

[t]hus, where a barge was not designed or used to transport passengers, cargo, or equipment from place to place across navigable waters, where the barge required tugboats or other vessels to move it, and where the barge remained virtually stationary during any particular project, the barge would not qualify as a Jones Act vessel.²⁴⁵

Contrary to its findings in *Gremillion* and *Ellender*, the Fifth Circuit in *Sharp v. Johnson Bros. Corp.* reversed the grant of summary judgment denying vessel status to a flotilla of construction barges used in bridge construction on Lake Pontchartrain.²⁴⁶ The five vessel flotilla consisted of a tug, two spud barges with mobile cranes for driving piles, and two ordinary flat deck barges for transporting and storing materials.²⁴⁷ The tug frequently moved the barges to the next piling and, once or twice a week, towed a spud barge and deck barge across a portion of the lake to obtain supplies.²⁴⁸ In addition, four times during the year of the accident, the flotilla was moved out of the lake to a safe harbor in response to hurricane

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 806 (citing *Gremillion*, 903 F.2d at 290; *Ducrepont*, 877 F.2d at 395). The *Ellender* panel declined to follow an earlier Fifth Circuit decision, *Brunet v. Boh Bros. Constr. Co.*, 715 F.2d 196, 197 (5th Cir. 1983), which held that a pile driving barge was a Jones Act vessel. In *Brunet*, the pile driving barge was held to be a vessel because it was designed to transport a crane across navigable waters. *Brunet*, 715 F.2d at 198-99. The *Ellender* court distinguished *Brunet* because the assembly used to support the frame in that case was specifically designed for transporting it from one job site to another, while the assembly supporting the crane in *Ellender* was not solely designed for such purposes. *Ellender*, 909 F.2d at 808.

²⁴⁶ *Sharp*, 917 F.2d at 889.

²⁴⁷ *Id.* at 886-87.

²⁴⁸ *Id.* at 887.

threats.²⁴⁹ Relying on the factors in *Bernard*, and analogizing to the facts in *Brunet*, the Fifth Circuit held that the jury was entitled to determine whether the transportation function was not merely incidental to the flotilla's work platform function.²⁵⁰ It is interesting to note that despite the similarity of the two cases, the *Sharp* panel did not distinguish or even mention *Ellender*, which was decided only three months earlier.

Consistent with *Sharp*, the Fifth Circuit has upheld vessel status in its most recent decisions on the subject. In *Ducote*, the court reversed the grant of summary judgment and remanded the case so that a jury could consider whether a spud barge used for driving piles on the Red River was a vessel for Jones Act purposes.²⁵¹ Although the accident occurred while the spud barge was moored, the court found that the construction project called for the barge to move approximately five miles along the bank of the river.²⁵² According to the court, this movement entitled the jury to decide whether the transportation function was merely incidental to its function as a work platform.²⁵³

Some commentators have suggested that recent decisions such as *Ducote* indicate a less restrictive application of the Jones Act by the federal courts.²⁵⁴ However, in reality these

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 888-89. The court found that the "extensive movement" by the barges supported a determination by the jury that the transportation function was not merely incidental. *Id.* at 889.

²⁵¹ *Ducote*, 953 F.2d at 1004.

²⁵² *Id.* The court held that the planned movement of the barge distinguished the case from others where the primary movement of the barge was to its initial work site. *Id.*

²⁵³ *Id.* *Ducote* is consistent with a recent decision, *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992), where the Fifth Circuit affirmed a jury's finding of vessel status with respect to a barge that was used to transfer grain from river barges to ocean-going vessels. Rejecting that the barge was merely a "floating grain elevator," the court ruled that its transportation function was not incidental to its primary purpose as a work platform because it was used to transfer grain even though the cargo was moved only short distances. *Michel*, 957 F.2d at 190.

²⁵⁴ See, e.g., Harvey J. Lewis, *Maritime Claims Arising from Gaming Vessel Operations*, Presented at the Gaming Seminar, Tulane Law School 11-13 (Sept. 9, 1994) (transcript on file with author); Paul S. Edelman, *Definition of a Vessel*,

decisions merely reiterate the Supreme Court's position that marginal questions of vessel status be determined by juries rather than judges,²⁵⁵ and they have not significantly altered the definition of a vessel for purposes of the Jones Act handed down in *Bernard* and its progeny.²⁵⁶

The confusion that has developed regarding Jones Act vessel status analysis has led several scholars to complain that the recent line of Fifth Circuit vessel cases lack a sound theoretical underpinning, are difficult to reconcile, and produce arbitrary results.²⁵⁷ Given the difficulty that courts have ex-

N.Y. L.J., Sept. 6, 1993, at 3. *But cf.*, Allbritton, *supra* note 25 at 397-402 (advocating more restrictive reading of Jones Act).

²⁵⁵ The Supreme Court has liberally construed the Jones Act when faced with questions of vessel and seaman status. For example in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 83 (1991), an employee of a ship repair facility was injured on board a floating structure. In describing the structure, the Court pointed out that it consisted of:

[s]everal floating platforms, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge. These platforms by themselves have no power, means of steering, navigation lights, navigation aids, or living facilities. They are moved about by tugboats . . . [and] are used to move equipment, materials, supplies, and vessel components

Gizoni, 502 U.S. at 83. In affirming the Ninth Circuit's reversal of a district court determination that the injured worker was not a Jones Act seaman as a matter of law, the Supreme Court stated that questions of fact existed as to whether the floating structure was a vessel in navigation. *Id.* at 84-85.

²⁵⁶ This view is supported by the fact that the only mention of *Gizoni* in *Ducote* is a brief citation in a note to the effect that "seaman status is of necessity fact-specific." *Ducote*, 953 F.2d at 1002 n.4. The court in *Michel*, 957 F.2d at 190, did not even mention *Gizoni* in its determination of vessel status. Lower courts have been able to minimize the impact of *Gizoni* by simply distinguishing it on the basis of its facts. For example, in *DiGiovanni*, 959 F.2d at 1124, the court reversed a jury finding of Jones Act vessel status. The court distinguished *Gizoni* by pointing out that the plaintiff in that case was injured on a platform that was "engaged in transportation." *Id.* Similarly, in *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F. Supp. 1260, 1262 (S.D. Miss. 1994), the court granted summary judgment and denied Jones Act vessel status on the ground that "the result reached in *Gizoni*, i.e., that summary judgment was inappropriate, was therefore consistent with — rather than repugnant to — the guidelines set forth by *Gremillion*." *Ketzel*, 867 F. Supp. at 1265.

²⁵⁷ According to one commentator, "[t]he distinction between these and many of the other vessel cases is without theoretical significance either based upon the objective characteristics of the structures themselves or the relative perils faced by

perienched distinguishing among special purpose vessels associated with non-traditional maritime industries, there is little reason to believe that similar problems will not arise when courts are asked to rule on the status of gaming vessels.

1. *Jones Act Vessel Status of Category I Gaming Vessels*

There is little question that gaming vessels which are required to cruise on a regular basis will be deemed "vessels in navigation," and that employees who perform a substantial amount of their duties on board these vessels will be given "seaman" status.²⁵⁸ All of the definitional characteristics of Jones Act vessels developed in the *Bernard* line of cases are present.²⁵⁹ Moreover, because these gaming vessels actually transport passengers over water, the vessels' employees are subjected to the same variety of "perils of the sea" as more traditional vessels in navigation.

Vessels in Category I(b), those that are capable of cruising but remain dockside for extended periods of time, should also be deemed Jones Act vessels. These gaming vessels were designed and built to transport passengers over water, are self-

the workers in question. This area of law cries out for fundamental reform." 1 SCHOENBAUM, *supra* note 60, at 216; see also Allbritton, *supra* note 25, at 397 n.179 (finding that "the decisions are hard to reconcile and illustrate the lack of precision of the test and the difficulty of its application to a given fact situation"); David W. Robertson, *The Law of Seamen Status Clarified*, 23 J. MAR. L. & COM. 1, 14-15 (1992) (writing that *Ellender* and *Sharp* decisions were wrongly decided on "prolix and flabby doctrine"). According to Robertson, "perhaps the *Sharp* structure moved somewhat more frequently and extensively than the one involved in *Ellender*, but the two cases are certainly not distinguishable on any sensible policy basis." Robertson, *supra* at 15.

²⁵⁸ A general consensus has emerged within the plaintiff and defense bars that gaming vessels which cruise are "vessels." See Alexander N. Breckinridge, IV & Anne F. Redd, *Employee and Passenger Claims Against Casino Boat Operators*, Presented at the Gaming Seminar, Tulane Law School 1 (Sept. 9, 1994) (transcript on file with author) (admitting that cruising casinos should be classified as Jones Act vessels); Lewis, *supra* note 254, at 3-4 (noting that cruising casinos meet test for vessel status); Stuart I. Platt, *Practical Aspects of Handling Employee and Guest Claims For the Riverboat Casino Operator*, Presented at the Gaming Seminar, Tulane Law School 4 (Sept. 9, 1994) (on file with author) (stating that under *Wilander* cruising casinos are vessels); Wallace, *supra* note 10, at 5 (same).

²⁵⁹ See *supra* notes 218-29 and accompanying text.

propelled, have all of the navigational aids, equipment, and licensed crew necessary to navigate on short notice, and must meet all Coast Guard regulatory requirements pertaining to passenger vessels.²⁶⁰ Even those gaming vessels that have remained dockside for many months, such as those located primarily in Louisiana, share these nautical features and thus should continue to be deemed Jones Act vessels until state laws are amended to allow them to remain dockside permanently.²⁶¹

Unlike those vessels that remain dockside because of some special circumstance, such as bad weather or navigational hazard, it is less clear whether Category I vessels moored in Shreveport and Bossier City, Louisiana or the *President* in Biloxi, Mississippi will be deemed Jones Act vessels.²⁶² The Louisiana vessels located on the Red River have been specifically exempted by statute from cruising, while the *President* is not required to cruise under Mississippi law.²⁶³ Even though these vessels meet most of the navigational indicia laid down in *Bernard*, the fact that they are permanently moored in one location may override these factors.²⁶⁴

2. Jones Act Vessel Status of Category II Gaming Vessels

Category II gaming vessels are converted cruise ships or excursion boats that were capable of navigating under their own power, but no longer possess such capabilities.²⁶⁵ These vessels were designed and built to transport passengers and

²⁶⁰ See *supra* notes 36-40 and accompanying text. These requirements include 46 U.S.C. §§ 3301-3318 (1994) (listing inspection requirements); 46 C.F.R. §§ 170.001-770.300 (1994) (setting out stability requirements); 46 C.F.R. §§ 50.01-5 to 50.30-20 (1993) (providing regulations for marine engineering); and 46 C.F.R. §§ 110.01-1 to 110.30-7 (1994) (listing provisions for electrical engineering).

²⁶¹ The requirement that all of the gaming vessels in Louisiana remain capable of navigation and employ a full marine crew serves one of the state's primary policy goals of supporting the state's shipbuilding and marine industries.

²⁶² See *supra* notes 41-45 and accompanying text.

²⁶³ See *supra* note 45 and accompanying text.

²⁶⁴ See *supra* notes 218-23 and accompanying text; see also *infra* notes 281-82 and accompanying text.

²⁶⁵ See *supra* notes 46-49 and accompanying text.

retain many of their navigational features, such as raked bows and much of their navigational equipment. However, the permanently moored status of these gaming vessels, combined with their changed physical characteristics, weighs strongly against finding them to be Jones Act vessels.²⁶⁶ Moreover, the rule developed by the Fifth Circuit in *Ducrepont*²⁶⁷ and adopted by the First Circuit in *DiGiovanni*,²⁶⁸ which emphasizes that a vessel's current use rather than its original design or purpose may determine its status as a vessel,²⁶⁹ will be quite persuasive if applied to gaming vessels in Category II. For these reasons, it is unlikely that employees who are injured on such vessels will receive seaman status.

3. Jones Act Vessel Status of Category III Vessels

Dockside gaming barges in Mississippi that fall under Category III should not be deemed "vessels in navigation" for purposes of the Jones Act or other seaman's remedies. Ornamental dockside barges located in Mississippi were neither designed nor constructed to move passengers or cargo over water, nor do these structures have any of the navigational indicia such as self-propulsion, raked bows, navigational aids, crew quarters, life-saving equipment or other features that characterize traditional vessels. Most importantly, their permanence strongly suggests that any transportation function is merely incidental to their use as a floating platform.

Two district court decisions dealing with Jones Act claims by a bartender and a cocktail waitress against the *Biloxi Belle* support the view that Mississippi's dockside gaming vessels are not "vessels in navigation." In *Pavone v. Mississippi Riverboat*

²⁶⁶ All of the gaming vessels in Category II have been deemed "permanently moored vessels" by the U.S. Coast Guard and are no longer inspected by that agency.

²⁶⁷ *Ducrepont v. Baton Rouge Marine Enter.*, 877 F.2d 393 (5th Cir. 1989).

²⁶⁸ *DiGiovanni*, 959 F.2d at 120.

²⁶⁹ *Ducrepont*, 877 F.2d at 396. The court cited its decision in *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986), for the proposition that the current use, rather than original purpose, is determinative of vessel status. *Ducrepont*, 877 F.2d at 396.

Amusement Corp.,²⁷⁰ Judge Beer of the Eastern District of Louisiana concluded that as a matter of law, the *Biloxi Belle* is not a vessel under the Jones Act.²⁷¹ The court described the gaming vessel as follows:

Biloxi Belle was originally designed to look like a riverboat with a paddlewheel and pilothouse, which served only for decoration. Although the paddlewheel is motorized, it was constructed to turn completely above the water level, and therefore, is not used as a means of propulsion. *Biloxi Belle* also was constructed without navigational aids, such as running lights and anchor lights. *Biloxi Belle* does not have any working features generally associated with a vessel in navigation. There are no crewquarters or lifesaving equipment, nor is there a captain who is master.²⁷²

In Judge Beer's view, the *Biloxi Belle's* non-maritime status was so obvious that it warranted little discussion. He went so far as to belittle courts that nurture the "myth of vessel status."²⁷³

Pavone was cited favorably in *Ketzel v. Mississippi Riverboat Amusement, Ltd.*,²⁷⁴ which also ruled as a matter of law that the *Biloxi Belle* was not a Jones Act vessel.²⁷⁵ The

²⁷⁰ No. CIV.A. 93-3354, 1994 WL 97820, at *1 (E.D. La. Mar. 21, 1994).

²⁷¹ *Pavone*, 1994 WL 97820, at *2.

²⁷² *Id.* at *1.

²⁷³ *Id.* at *2. According to Judge Beer:

Perhaps the seriousness with which this matter needs now be addressed speaks most eloquently of how far the courts have unwittingly embolden [sic] and nurtured the myth of vessel status. For the plain unvarnished facts of this matter should, on their face, resolve the vessel status issue. Yet, the stilted, ends justify the means applications that have wormed their way into the law now require this plodding address.

Id. at *2. It should be noted that for many years, Judge Beer has been a vocal critic of what he perceives as "the Fifth Circuit's ever broadening definition of a 'vessel.'" *Id.* For a detailed discussion of Judge Beer's views on this issue, see, Beer, *supra* note 25, at 12.

²⁷⁴ 867 F. Supp. 1260, 1267 (S.D. Miss. 1994). The *Ketzel* Court noted that it concurred with the decision reached in *Pavone* through application of the current use test. *Ketzel*, 867 F. Supp. at 1267.

²⁷⁵ *Id.*

Ketzel court adopted the restrictive test applied in *DiGiovanni*,²⁷⁶ which placed emphasis on whether the floating structure was currently used in navigation which consequently exposed employees to seamen's hazards.²⁷⁷ The court did not distinguish or even mention the Fifth Circuit's recent *Sharp* or *Ducote* decisions, which did not apply the "current use" exception.²⁷⁸ Instead, the court pointed out that the "*Biloxi Belle* is not equipped, nor does it serve any transportation function whatever."²⁷⁹ It analogized the *Biloxi Belle* to the floating fish processing plant in *Kathriner*²⁸⁰ and the floating dance hall in *Hayford*,²⁸¹ and found that the fact that the *Biloxi Belle* must be moved in the event of a hurricane is not determinative of Jones Act vessel status.²⁸²

Although the court in *Ketzel* chose to apply the most restrictive test for purposes of determining vessel status, the outcome would probably have been the same if it had applied the traditional *Bernard* factors.²⁸³ Moreover, the lack of nauti-

²⁷⁶ *Id.*; see *DiGiovanni*, 959 F.2d at 1121 (discussing "current use" doctrine).

²⁷⁷ The *Ketzel* court, quoting *DiGiovanni*, stated:

A worker becomes a seaman not by reason of the *physical characteristics* of the structure to which he is attached, but because its being operational "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past, or by its future potential, and to give him these special benefits by *mechanical definitions* without the *exposure* is misplaced generosity. . . .

Ketzel, 867 F. Supp. at 1267 (quoting *DiGiovanni*, 959 F.2d at 1123). Interestingly, *Ketzel* noted that *Pavone* also applied "the currently in navigation test." *Id.* However, the author's reading of *Pavone* does not support this assertion. In fact, *Pavone* found the *Biloxi Belle* not to be a vessel based on the more traditional standards described in *Ellender*, 909 F.2d at 803. *Pavone*, 1994 WL 97820, at *2.

²⁷⁸ According to one commentator, "[t]he reference in *Ducote* to the original purpose or design of the barge as a significant factor concerning vessel status would appear to conflict with the *Ducrepont* current use exception." Allbritton, *supra* note 25, at 400 n.199.

²⁷⁹ *Ketzel*, 867 F. Supp. at 1268.

²⁸⁰ *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992). In *Kathriner*, the court held that a floating fish processing plant was not a vessel for purposes of the Jones Act. *Kathriner*, 975 F.2d at 662.

²⁸¹ *Hayford v. Doussony*, 32 F.2d 605 (5th Cir. 1929). In *Hayford*, the court held that the floating dance hall was not governed by admiralty jurisdiction. *Hayford*, 32 F.2d at 605.

²⁸² *Ketzel*, 867 F. Supp. at 1266-67.

²⁸³ Under *Bernard*, structures qualifying as "floating work platforms" rather

cal indicia and the permanence of the structures heavily weigh against finding vessel status.²⁸⁴

4. Jones Act Vessel Status in State Court

Given the low probability that federal courts will grant seaman status to employees of both Category II and Category III dockside gaming vessels, plaintiffs may have a slightly better chance of success by filing their claims in state court. A plaintiff may elect to file a Jones Act claim in state court under the "saving to suitors clause."²⁸⁵ State courts that have acquired jurisdiction over a Jones Act claim may also exercise jurisdiction over concurrent claims arising under general maritime law, such as unseaworthiness and maintenance and cure, but federal substantive law is applied in these actions.²⁸⁶

Two recent decisions by the Supreme Courts of Mississippi and Louisiana indicate that these tribunals may be more amenable to finding seaman status than their federal counterparts.²⁸⁷ In *Texaco v. Addison*,²⁸⁸ the Mississippi Supreme Court unanimously affirmed a lower court decision that found a roustabout who injured his back while working on a fixed platform in the Gulf of Mexico to be a Jones Act seaman.²⁸⁹ Al-

than Jones Act vessels share three characteristics: (1) constructed primarily as work platforms; (2) moored or secured at time of accident; and (3) transportation function merely incidental to function as a work platform are all in evidence. *Bernard*, 741 F.2d at 831.

²⁸⁴ See *supra* notes 219-23 and accompanying text.

²⁸⁵ See *supra* note 63 and accompanying text; see also *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943) (noting that Jones Act claims may be commenced in state court); *Engel v. Davenport*, 271 U.S. 33 (1926) (holding that state courts have concurrent jurisdiction over claims under Merchant Marine Act).

²⁸⁶ See *Potashnick-Badgett Dredging, Inc. v. Whitfield*, 269 So. 2d 36, 40 (Fla. Dist. Ct. App. 1972) (applying federal law). However, where the suit is *in rem*, only the federal admiralty court has jurisdiction. GILMORE & BLACK, *supra* note 60, at 40.

²⁸⁷ While state courts must generally apply federal admiralty law when they accept jurisdiction under the "saving to suitors clause," there is considerable room for varying judicial interpretations, especially where there is no clearly established federal rule.

²⁸⁸ 613 So. 2d 1193 (Miss. 1993).

²⁸⁹ *Addison*, 613 So. 2d at 1202.

though the injury occurred on the platform, the claimant performed a substantial amount of his work aboard a welding barge that was moored to the fixed platform.²⁹⁰ The welding barge was routinely towed to shore to pick up supplies.²⁹¹ Having found that the claimant was permanently assigned to the welding barge and contributed to the accomplishment of its mission, the supreme court addressed the question of whether the barge was a vessel for purposes of the Jones Act.²⁹² Instead of applying a traditional *Bernard* type analysis, the court approved a "capability" test adopted by the Louisiana Supreme Court in *Orgeron v. Avondale Shipyards, Inc.*²⁹³ This test is based on the definition under general maritime law that a vessel is "every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water."²⁹⁴ According to the Mississippi Supreme Court in *Addison*, the *Orgeron* court "found that a barge used as a work platform was a 'vessel' because it was capable of navigation on water and at the time of the accident, was floating on navigable water."²⁹⁵ However, by adopting the *Orgeron* "capability" test for purposes of defining vessel status under the Jones Act, the Mississippi Supreme Court went far beyond what was intended in *Orgeron*. The Louisiana Supreme Court made it clear that the "capability" test only applies to suits under the Longshore and Harbor Workers Compensation Act and not under the Jones Act,²⁹⁶ and specifically found that a

²⁹⁰ *Id.* at 1200.

²⁹¹ *Id.* at 1195. The crew accompanied the barge on these tugs. *Id.*

²⁹² *Id.* at 1200. The court noted that the claimant was assigned to the barge and not the floating platform. *Id.*

²⁹³ 561 So. 2d 38 (La. 1990).

²⁹⁴ *Orgeron*, 561 So. 2d at 41. For a discussion of this definition, see *supra* notes 138-42 and accompanying text.

²⁹⁵ *Addison*, 613 So. 2d at 1200 (citing *Orgeron*, 561 So. 2d at 43).

²⁹⁶ *Orgeron*, 561 So. 2d at 43. The *Orgeron* court noted that "the term vessel in the LHWCA is not synonymous with the term vessel in the Jones Act." *Id.* It went on to find that "[t]he court of appeal failed to note that this language was used in the analysis of a barge as a Jones Act vessel and not as a Section 905(b) vessel." *Id.* "The issue of whether the barge performed a transportation function as a primary or incidental matter relates to vessel status under the Jones Act." *Id.*

Bernard type analysis is appropriate for purposes of the Jones Act.²⁹⁷

Whether the Mississippi Supreme Court intended *Addison* to be interpreted as a radical departure from established federal law or simply was imprecise in its analysis is unclear. The author tends to believe it was the latter because after adopting the "capability" test the court back-pedaled by pointing out that the welding barge in *Addison* "was not *permanently* attached to one location[,] . . . it was pushed or pulled to shore when necessary[,] . . . it was secured by bits and mooring lines[,] . . . and was subject to the perils of the sea."²⁹⁸ Therefore, the court concluded by noting that the welding barge "was not only capable of being used as 'a means of transportation on water' but actually [was] used for that purpose."²⁹⁹

Regardless of the precise meaning of the "capability" test in *Addison*, at the very least, the decision upheld seaman status under factual circumstances where it likely would have been denied in federal court.³⁰⁰ Consequently, Mississippi Supreme Court case law may afford a better chance of recovery than the more stringent requirements in federal court.

A similar outcome may be achieved in Louisiana in light of *Ebanks v. Reserve Marine Enter., Inc.*³⁰¹ In *Ebanks*, a worker was injured on a crane barge which was anchored by spuds and only moved occasionally to offset changes in the water level of the Mississippi River.³⁰² "The barge had no kitchen, living

²⁹⁷ *Id.* at 43 n.17. The court held that a *Bernard* analysis under the LHWCA was inappropriate. *Id.* at 43.

²⁹⁸ *Addison*, 613 So. 2d at 1200.

²⁹⁹ *Id.* The court noted that the barge "was regularly used to move men and materials between the shore and the tank battery." *Id.*

³⁰⁰ It is difficult to distinguish many of the barges denied Jones Act vessel status in the Fifth Circuit from the welder's barge in *Addison*. See *supra* notes 215-18 and accompanying text (discussing Fifth Circuit Jones Act cases). It is especially difficult to distinguish the welding barge from the construction barge denied Jones Act vessel status in *DiGiovanni*, 959 F.2d at 1119.

³⁰¹ 625 So. 2d 1050 (La. 1993).

³⁰² *Ebanks v. Reserve Marine Enter., Inc.*, 620 So. 2d 355, 356 (La. Ct. App.) (affirming trial court's dismissal of Jones Act claim brought by crane operator aboard crane barge used as stationary work platform), *rev'd per curiam*, 625 So. 2d 1050 (La. 1993).

quarters, navigation lights, or means of self-propulsion," and was attached to the shore by a cat-walk so that workers could reach it.³⁰³ Despite the design and use of the barge as a work platform, its permanence to shore and its almost total lack of nautical indicia, the Louisiana Supreme Court reversed the appeals court's denial of Jones Act vessel status and ordered the case remanded for trial before a jury.³⁰⁴ According to one commentator, "*Ebanks* clearly recognizes that any craft that satisfies the capability test will be eligible for Jones Act relief, thus putting Louisiana on the same footing as the State of Mississippi."³⁰⁵ Although this summation of *Ebanks* and *Addison* is probably more a product of wishful thinking than legal reality, these two state court cases do offer some hope of relief under the Jones Act to employees injured on dockside gaming vessels.

In summary, with the possible exception of employees who are injured or killed aboard a gaming vessel that is actually engaged in navigation, it is unlikely that employees of Categories II or III dockside gaming vessels will be granted seaman status in federal court. Consequently, the remedies for negligence under the Jones Act, and those for unseaworthiness and maintenance and cure under general maritime law should not be available. If the suit is filed in a Mississippi or Louisiana state court under the "savings to suitors clause," there is a somewhat better chance that the case may at least be heard by a jury. There is no reason to address the issue of whether employees of Category IV gaming vessels are Jones Act seamen. These gaming vessels are physically separated from navigable waters and therefore cannot meet the requirement of being a "vessel in navigation" laid down in *Wilander*.³⁰⁶

³⁰³ *Ebanks*, 620 So. 2d at 356-56.

³⁰⁴ *Ebanks*, 625 So. 2d at 1050. In a *per curiam* opinion, the Louisiana Supreme Court held that vessel status is a question of fact within the province of the jury. *Id.*

³⁰⁵ Lewis, *supra* note 254, at 12.

³⁰⁶ *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); see *supra* note 208-14 and accompanying text.

D. Longshore and Harborworkers' Compensation Act

Injured employees of gaming vessels who cannot qualify as seamen, but who still engage in traditional maritime labor, may be able to seek remedy under the federal Longshore and Harbor Workers Compensation Act (LHWCA).³⁰⁷ LHWCA coverage requires that a claimant satisfy both a geographic situs³⁰⁸ and an occupational status test.³⁰⁹ Except for Category IV gaming vessels, which are not located on navigable waterways, most employees who are injured on a gaming vessel or its waterfront facilities should be able to meet the situs requirement.³¹⁰

On the other hand, most casino employees will have a difficult time meeting the status requirement. The Supreme Court has held that to be covered by the LHWCA, an employee must be doing work that is "an integral or essential part of loading or unloading a vessel."³¹¹ Employees who spend a substantial amount of time loading or unloading supplies onto the gaming vessel or who are engaged in work to restore the vessel

³⁰⁷ 33 U.S.C. §§ 901-950 (1988).

³⁰⁸ The LHWCA "situs" test provides that:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability, or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

Id. § 903.

³⁰⁹ 33 U.S.C. § 902(3) (1988). Section 902(3) grants occupational status to those who are "engaged in maritime employment." *Id.* This includes longshoremen, harbor workers, shipbuilders, ship repairers, and ship breakers. *Id.*

³¹⁰ See 33 U.S.C. § 903 (1988). According to one commentator, "the situs test has caused few problems in the courts." 1 SCHOENBAUM, *supra* note 60, at 316 n.13; see, e.g., *Jenkins v. McDermott, Inc.*, 734 F.2d 229, 232 (5th Cir.) (applying situs test), *vacated in part*, 742 F.2d 191 (1984).

³¹¹ *Chesapeake & O. Ry. v. Schwalb*, 493 U.S. 40, 44 (1989); see also *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 414 (1985) (holding welders and other workers who simply perform tasks around ships but do not engage in traditional maritime employment are not covered by LHWCA).

to a "healthy and safe" operating condition may be covered by the Act.³¹² Casino employees who are only occasionally or peripherally involved in loading or unloading operations will not be covered.³¹³ An employee granted seaman status is excluded from coverage under the LHWCA.³¹⁴ However, it is permissible for an employee whose occupation is specifically listed in § 902(3) of the LHWCA to concurrently or successively bring a claim under the Jones Act.³¹⁵

Moreover, in 1984, Congress amended the LHWCA to exclude certain categories of workers from coverage as long as they are subject to state workers' compensation law.³¹⁶ Of special concern to employees of gaming vessels is an exemption of individuals "employed by a club, camp, recreational operation, restaurant, museum, or retail outlet."³¹⁷ It is not entirely clear whether gaming vessel employees fall under this exemption, however, the legislative history of the 1984 amendments seems to support their exclusion from coverage.³¹⁸ According to the legislative history, the amendments were intended to exclude certain individuals "who are employed by enterprises which are not generally viewed as maritime employers, although located on or adjacent to navigable waters, and who are not otherwise exposed to maritime hazards."³¹⁹ By way of ex-

³¹² See *New v. Associated Painting Servs., Inc.*, 863 F.2d 1205, 1210 (5th Cir. 1989) (rejecting plaintiff's contention that § 905(b) of LHWCA covered routine maintenance).

³¹³ See *Sea-Lane Service, Inc. v. Rock*, 953 F.2d 56, 58 (3d Cir. 1992) (holding driver of courtesy van that transported passengers to and from employer's vessel not covered by LHWCA).

³¹⁴ 33 U.S.C. § 902(3)(G) (1988) provides that "a master or member of a crew of any vessel" is specifically excluded from LHWCA coverage.

³¹⁵ *Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. at 486, 488 (1991).

³¹⁶ 33 U.S.C. § 902(3) (1988). For legislative history of the 1984 amendments, see *Longshore Harbor Worker's Compensation Amendments of 1984*, H.R. REP. NO. 98-570, Part I, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 2734.

³¹⁷ 33 U.S.C. § 902(3)(B) (1988).

³¹⁸ See *supra* note 316-17 and accompanying text.

³¹⁹ *Longshore and Harbor Workers' Compensation Act Amendments of 1984*, H.R. REP. NO. 98-570, Part I, 98th Cong. 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2734-36.

ample, Congress noted that "[t]he employees of a recreational marina who are engaged in taking reservations, servicing boats, preparing and serving food, and other such activities would be excluded from the definition of 'employee' and thus, from the Act's coverage."³²⁰

It is too early to draw any definitive conclusions regarding the exclusion of gaming vessel employees from coverage under the LHWCA. However, in light of existing case law and the 1984 amendments, it is unlikely that gaming vessel employees will be covered by the Act except in those rare circumstances where they spend a substantial amount of their workday loading or unloading supplies onto the vessel or are engaged in the vessel's repair or renovation.

V. PERSONAL INJURY AND DEATH CLAIMS BY PATRONS

Patrons may bring claims under general maritime law of negligence for injuries or wrongful death occurring on gaming vessels. As with any tort claim brought under general maritime law, a claimant will be required to satisfy the "locality" and "maritime nexus" tests set out in *Sisson v. Ruby*.³²¹ Obviously, it is more likely that a patron injured aboard a Category I vessel will meet these maritime requirements than one who is injured on a Category III vessel.³²²

However, if the *Sisson* requirements are met, the tort action may be brought in federal admiralty court even if the patron is injured on land. As long as a negligent act or omission aboard a vessel is causally involved, the claim may be brought under the Admiralty Extension Act.³²³ For example, if a gaming vessel supplies liquor to a patron who then gets into his automobile and runs over another patron in the park-

³²⁰ *Id.* § 2738.

³²¹ 497 U.S. 358 (1990); see *supra* notes 98-121 and accompanying text.

³²² See *supra* notes 122-32 and accompanying text.

³²³ 46 U.S.C. § 740 (1988). Section 740 provides that: "admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." *Id.* § 740.

ing lot, the injured party may be able to bring a maritime tort action against the vessel under the Admiralty Extension Act.³²⁴ It is also possible to find admiralty jurisdiction, even in the absence of the Admiralty Extension Act, when a negligent act or omission takes place on board a vessel with the resulting injury occurring on land. One court upheld federal admiralty jurisdiction when a passenger of a cruise ship was stabbed and robbed on an adjoining pier as a result of not being warned by the crew about the area's crime problem.³²⁵ The court found that the alleged negligence which occurred on board the vessel was the failure of the crew member to warn the passenger.³²⁶

Passengers and other non-seamen are not owed a warranty of seaworthiness.³²⁷ Instead, gaming vessels owe their patrons a duty to exercise reasonable care under the circumstances.³²⁸ In other words, the duty shifts depending on the specific circumstances of the individual claimant and the conditions aboard the vessel on which the accident occurred. In most cases, liability will only be imposed if the vessel operator has actual or constructive knowledge of the fault that caused the harm.³²⁹ Passengers need only be warned of dangers that are not apparent or obvious.³³⁰ However, a higher standard of

³²⁴ See *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1251-52 (8th Cir. 1980) (upholding admiralty jurisdiction in suit by passenger of "booze cruise" struck by another passenger's automobile in parking lot six minutes after disembarking).

³²⁵ *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 490 (D.P.R. 1992).

³²⁶ *Gillmor*, 789 F. Supp. at 490.

³²⁷ See *Gibboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975) (exercising of reasonable care is duty owed by vessel owners); see *supra* note 190-92 and accompanying text.

³²⁸ *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). In *Kermarec*, the Supreme Court held "that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to [the owner's] legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Kermarec*, 358 U.S. at 632.

³²⁹ See, e.g., *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1356 (11th Cir. 1990); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1321 (11th Cir. 1989); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988).

³³⁰ See generally *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 42 (S.D.

care will be imposed if a patron is known to have physical disabilities or other special needs.³³¹ The doctrine of *res ipsa loquitur* is available to passengers under general maritime law.³³² The maritime rule governing *res ipsa loquitur* has been interpreted as being more favorable to plaintiffs than the rule applied in most state common law jurisdictions.³³³

There is some authority that vessel owners are strictly liable for the intentional misconduct of their crew.³³⁴ In *Morton v. Oliveira*,³³⁵ a passenger claimed that she was raped in her cabin by a crew member while her husband was gambling in the ship's casino.³³⁶ The Ninth Circuit held that the cruise ship owed its passenger an absolute duty of protection from the assaults and aggressions of its servants despite the fact that the servant was acting outside the scope of his employ-

Fla. 1986) (stating vessel owner not liable where passenger tripped over ledge hidden by shower curtain).

³³¹ See generally *American President Lines, Ltd. v. Lundstrom*, 323 F.2d 817, 819 (9th Cir. 1963); *Alpert v. Zim Lines*, 370 F.2d 115, 116 (2d Cir. 1966); see also Nathaniel Pieper & David W. McCreadie, *Cruise Ship Passenger Claims and Defenses*, 21 J. MAR. L. & COM. 151, 177 (1990).

³³² See *Johnson v. United States*, 333 U.S. 46, 48 (1948) (stating that doctrine of *res ipsa loquitur* was applicable to facts of case); *Hill v. Atlantic Navigation Co.*, 218 F.2d 654, 656 (4th Cir. 1955) (applying *res ipsa loquitur* where explosion aboard ship was unexplained).

³³³ According to one source:

On the proximate cause issue [the plaintiffs] burden is likewise reduced to featherweight by the Supreme Court's development of its own special brand of *res ipsa loquitur*, which it has described as a rule of 'permissible inferences from unexplained events'. . . . Apparently the only way in which defendant can win a directed verdict is to establish by indisputable and uncontroverted evidence both the cause of the accident and its own freedom from negligence.

GILMORE & BLACK, *supra* note 60, at 377-78; see also Merlyn P. O'Keefe & Paul S. Edelman, *Injuries to Ship Passengers*, 5 MAR. L. REP. 65, 67 (1993) (stating similar proposition).

³³⁴ See generally *Morton v. Oliveira*, 984 F.2d 347, 348 (9th Cir. 1993); *Muratore v. M/S Scotia Prince*, 845 F.2d 289, 292 (1st Cir. 1988); *Tullis v. Fidelity and Casualty Co. of N.Y.*, 397 F.2d 22, 29 (5th Cir. 1968). *Contra Jaffess v. Home Lines, Inc.*, No. 85 Civ. 7365, 1988 WL 1430 (S.D.N.Y. Apr. 22, 1988); *Spinola v. Costa Line, Inc.*, 637 F. Supp. 4, 5 (D.P.R. 1985).

³³⁵ 984 F.2d 289 (9th Cir. 1993).

³³⁶ *Morton*, 984 F.2d at 290.

ment.³³⁷ Until the Supreme Court definitively rules on the proper standard of care in passenger assault cases, gaming vessel operators will be unable to confidently predict the standard of care to which they will be held.³³⁸

Where the alleged tort is unintentional, courts have imposed higher standards of care if the circumstances surrounding the accident are uniquely maritime in nature. In *Rainey v. Paquet Cruises, Inc.*,³³⁹ the court reasoned that "[t]he extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger[] will determine how high a degree of care is reasonable in each case."³⁴⁰ The Fifth Circuit has also held that "[i]n some instances reasonable care under the circumstances may be a very high degree of care; [whereas] in other instances, it may be something less."³⁴¹ According to the Fifth Circuit, the circumstances that must be considered "include, *inter alia*, the experience of the crew, the type of carrier involved, the dangers to the passengers peculiar to that type of carrier, the carrier's degree of control over the passengers, and the carrier's ability to take precautions against such dangers."³⁴²

Within the context of potential tort liability of gaming vessels, an important question to ask is whether courts will impose a higher standard of care based upon the unique nature of casino gaming. In most respects, gaming vessel patrons face the same kinds of hazards as passengers on cruise ships and should be treated similarly by courts. However, as one commentator noted, "Casinos are dazzling and crowded. Distrac-

³³⁷ *Id.* at 292.

³³⁸ For a discussion of many of the conflicting decisions see Karen C. Hildebrandt, *Personal Injury and Wrongful Death Remedies for Maritime Passengers*, 68 TUL. L. REV. 403, 410-14 (1994).

³³⁹ 709 F.2d 169 (2d Cir. 1983).

³⁴⁰ *Rainey*, 709 F.2d at 172. In *Rainey*, the court dismissed a suit by a passenger who tripped over a stool in the ship's discotheque because the injury was not the type usually associated with a ship at sea. *Id.*

³⁴¹ *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416, 421 (5th Cir. 1986) (citing with approval, *Rainey*, 709 F.2d at 1691).

³⁴² *Smith*, 791 F.2d at 421.

tions are numerous and constant. The caution of casino patrons is inevitably altered by the environment, food and drink."³⁴³ Moreover, unlike passengers on cruise ships, gaming vessel patrons are sometimes served generous quantities of free liquor for extended periods of time and are free to leave the vessel on much shorter notice.³⁴⁴ The Fifth Circuit has found a vessel liable for operating an unsupervised "floating dram shop" that contributed to the death of a crew member.³⁴⁵ In contrast to federal admiralty law, some states, such as Mississippi, have enacted legislation that immunizes dram shops from liability for the negligent acts of intoxicated patrons.³⁴⁶ State legislation of this kind creates an additional incentive for gaming vessel operators to seek to have some types of tort actions adjudicated under state law rather than federal admiralty law.

VI. SUMMARY OF THE LAW

This article has examined the circumstances under which

³⁴³ Lewis, *supra* note 254, at 20.

³⁴⁴ It is a common policy among casinos to serve patrons complimentary liquor while they are gambling. Those patrons who are not actively gambling may still be able to take advantage of liquor prices that are generally lower than those paid in restaurants or bars in the surrounding community. The family of a woman who died in a car accident has recently sued the *President Casino* in Mississippi claiming that the drunken driver who hit her was negligently provided liquor by the casino. *Casino sued in Drunken Driver Death*, CLARION-LEDGER, (Jackson, Miss.), Jan. 25, 1995, at 5B.

³⁴⁵ *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 146 (5th Cir. 1980). In *Reyes*, the seaman was legally drunk when he drowned after jumping overboard to go for a swim. *Reyes*, 609 F.2d at 146. On remand, the defendant shipowner was ultimately found 15% negligent in his death. *Reyes v. Vantage S.S. Co.*, 672 F.2d 556, 557 (5th Cir. 1982).

³⁴⁶ MISS. CODE ANN. § 67-3-73 (1991). Under most state statutes, there is generally no limitation of liability when the server of alcohol knew or should have known that the patron was intoxicated. See generally MISS. CODE ANN. § 67-3-73(4) (1991); IOWA CODE ANN. § 123.92 (West 1994); IND. CODE ANN. § 7.1-5-10-15.5(b) (West Supp. 1994). Louisiana has no such law for visibly intoxicated patrons. See LA. REV. STAT. ANN. § 9:2800.1 (West 1991). However, many states have also enacted legislation that limits the amount of recovery under dram shop statutes. For a discussion of these statutes, see Edward L. Raymond, Jr., Annotation, *Validity, Construction and Effect of Statute Limiting Amount Recoverable in Dram Shop Action*, 78 A.L.R. 4TH 542 (1990).

personal injury and death claims against gaming vessels may be brought under federal admiralty jurisdiction. It has pointed out that under most circumstances, tort claims brought against Category I gaming vessels that either regularly engage in navigation or are capable of navigating under their own power will be deemed "maritime torts" for purposes of federal admiralty jurisdiction.³⁴⁷ Employees of such vessels, whether they are licensed members of the crew or unlicensed employees such as card dealers or bartenders, should be deemed "Jones Act Seamen."³⁴⁸ Patrons whose injuries either occurred aboard Category I vessels or took place on land but were causally connected to the vessel should also have federal maritime claims.³⁴⁹

It is less clear whether torts involving Category II gaming vessels fall under federal admiralty jurisdiction.³⁵⁰ These vessels are permanently moored, yet were capable of navigating under their own power in the past. Because they have some residual navigational capacity and may be moved on short notice, courts may deem them analogous to museum ships or "mothballed" vessels, which have been granted admiralty jurisdiction for some purposes.³⁵¹ Depending on the specific facts of the incident, a tort that occurs on a Category II vessel may comply with the *Sisson* "locality" and revised "maritime nexus" tests and thereby fall under admiralty jurisdiction.³⁵² It is less likely that employees will be granted "Jones Act Seamen" status because the Category II vessel will probably not meet the "in navigation" requirement.³⁵³

Torts that occur on Category III gaming vessels may also meet the *Sisson* test and be deemed maritime. The "locality" portion of the test is generally met because Category III vessels

³⁴⁷ See *supra* notes 122-27 and accompanying text. A possible exception could be a Category I vessel such as the *President* in Biloxi, Mississippi, which is fully capable of navigation, but is neither required by law to cruise nor has moved from its dockside facilities in many months.

³⁴⁸ See *supra* notes 258-64 and accompanying text.

³⁴⁹ See *supra* notes 328-33 and accompanying text.

³⁵⁰ See *supra* notes 46-49 and accompanying text.

³⁵¹ See *supra* notes 150-52 and accompanying text.

³⁵² See *supra* notes 98-121 and accompanying text.

³⁵³ See *supra* notes 265-69 and accompanying text.

are located on navigable waterways.³⁵⁴ It is unsettled whether Category III vessels should be granted "vessel status" under general maritime law.³⁵⁵ Admiralty jurisdiction will likely depend on the type of tort involved. Torts that have the potential to disrupt maritime commerce, such as those caused by fire or collision with another vessel, will likely meet the requisite "maritime nexus" requirement laid down in *Sisson*.³⁵⁶ Conversely, if the tort is a garden-variety slip and fall injury, it is unlikely that a "maritime nexus" will be found.³⁵⁷ Moreover, it is clear that employees of Category III gaming vessels will not be granted "seaman status" under the Jones Act.³⁵⁸ Two federal courts have already denied Jones Act claims by Category III casino employees primarily because the gaming vessels were permanently moored and were not designed to carry passengers over water.³⁵⁹ Some state courts have been more amenable to finding "seaman status" than their federal counterparts.³⁶⁰ Therefore, it may be wise under some circumstances for claimants to bring their actions in state court under the "saving to suitors clause."³⁶¹

Torts involving Category IV gaming vessels should be governed by state law. Because these vessels are located in mooring basins that are physically separated from navigable waters, they do not meet the "locality" requirement for purposes of admiralty jurisdiction under general maritime law or the Jones Act.³⁶² Maritime jurisdiction should be limited to torts that occur while a Category IV vessel is actually navigating to another location.³⁶³

³⁵⁴ See *supra* notes 79-88 and accompanying text.

³⁵⁵ See *supra* notes 143-46 and accompanying text.

³⁵⁶ See *supra* note 122 and accompanying text.

³⁵⁷ See *supra* note 128 and accompanying text.

³⁵⁸ See *supra* notes 270-84 and accompanying text.

³⁵⁹ See *supra* notes 270-84 and accompanying text.

³⁶⁰ See *supra* notes 285-306 and accompanying text.

³⁶¹ See *supra* notes 285-306 and accompanying text.

³⁶² See *supra* notes 83, 87-13 and accompanying text.

³⁶³ See *Ketzel*, 867 F. Supp. at 1260 (stating "caselaw is 'heavily skewed' against finding nonvessel status for a craft whose primary mission is to transport cargo, equipment or passengers over navigable waters"). The *Ketzel* court distin-

VII. CONCLUSION

As the number of states with legalized riverboat gaming increases, so will the volume and variety of tort claims involving casino vessels. This, in turn, may fuel the arguments of critics who feel that much of the existing legal regime governing maritime torts is both irrational and arbitrary.³⁶⁴ Moreover, as the market becomes more saturated and individual gaming vessels begin to fail, political pressure will grow to take steps to protect the economic viability of the industry and its associated jobs.³⁶⁵

There is little question that current law may in some instances mandate arbitrary distinctions between maritime and non-maritime tort claims. For example, there is little policy justification for granting admiralty jurisdiction to a slip and fall injury that occurs on a Category I gaming vessel while it is moored dockside, yet denying jurisdiction to a similar claimant on a Category III vessel. Similarly, it makes little sense to treat a card dealer on a Category I gaming vessel as a Jones Act seaman while denying such status to an identical employee who works on a Category III vessel.

Several respected scholars have advocated that the system in which Jones Act seamen are compensated be radically reformed.³⁶⁶ It remains to be seen whether these views will take

guished *Gizoni* because the platform on which the claimant was riding was actually in navigation when the claimant was injured. *Id.*

³⁶⁴ See *infra* note 366 and accompanying text.

³⁶⁵ The *Biloxi Belle* recently laid off 540 employees and became the first Mississippi Gulf Coast casino to file for bankruptcy. Several casinos along the Mississippi River have failed. Analysts predict that at least two more casinos along the coast will close before the supply of gambling space meets demand. *Biloxi Belle Casino Closes*, TIMES-PICAYUNE (New Orleans), Jan. 4, 1995, at A1.

³⁶⁶ GILMORE & BLACK, *supra* note 60, at 280. The commentators advocate that Congress shift the burden of compensating Jones Act Seamen away from the courts to an administrative agency by subjecting all maritime workers (including traditional seamen) to a mandatory and exclusive compensation system. *Id.* Another scholar similarly suggests that the Jones Act be integrated into the present scheme for compensating longshore and harbor workers. 1 SCHOENBAUM, *supra* note 60, at 218. Schoenbaum believes that certain workers that face extraordinary perils in their employment may be provided additional compensation in the form

on added weight in coming years should courts begin to hand down decisions against the riverboat gaming industry that are widely perceived as unreasonable.³⁶⁷

Although many of the arguments in support of some general type of legislative or judicial reform of the Jones Act are persuasive, any call for legislation that specifically targets workers on riverboat gaming vessels is misplaced. Congress has used this approach in the past when it enacted legislation that prohibited specific maritime workers from asserting maritime claims. Examples include the Oceanographic Research Vessels Act, which provides that scientific personnel who serve on research vessels are precluded from asserting a remedy under the Jones Act,³⁶⁸ and the Sailing School Vessels Act of 1982, which prevents sailing school instructors or students from being considered seamen.³⁶⁹

of a kind of "combat pay". 1 SCHOENBAUM, *supra* note 60, at 218.

Furthermore, the judicial determination of "vessel status" cries out for reform. 1 SCHOENBAUM, *supra* note 60, at 216. One commentator proposes that reforms come about through judge-made law rather than legislation. Robertson, *supra* note 24, at 170. Robertson argues that in determining Jones Act seaman status, courts should focus on whether or not the seaman's work "regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable waters." Robertson, *supra* note 24, at 120.

³⁶⁷ The trend by courts during the 1980's to narrow the definition of a "vessel" for purposes of the Jones Act was due in part to a recognition that too many workers on special purpose floating structures associated with the oil and gas and marine construction industries were claiming to be Jones Act Seamen. *See generally supra* notes 24-25 and accompanying text. There may be a similar judicial or legislative reaction if a large number of maritime tort actions are filed against gaming vessels.

³⁶⁸ 46 U.S.C. §§ 441-45 (1988). Although the Act prevents scientific personnel from asserting a claim under the Jones Act, such personnel may bring a cause of action under general maritime law for unseaworthiness and maintenance and cure. *See Craig v. M/V Peacock*, 760 F.2d 953, 955 (9th Cir. 1985) (denying Jones Act coverage for researcher who fell overboard and died, but allowing cause of action under general maritime law); *Kelley v. Western Geophysical Co. of Am.*, 666 F. Supp. 890 (E.D. La. 1987) (granting partial summary judgment for defendant regarding plaintiff's Jones Act claim, but allowing plaintiff's remedy under general maritime law); *see also Note, Admiralty Available to Oceanographic Research Vessel Personnel in the Wake of Presley v. M/V Caribbean Seal*, 58 TUL. L. REV. 1499 (1985) (analyzing case and commenting on effect of Fifth Circuit's decision).

³⁶⁹ 46 U.S.C. §§ 446-446(c) (1988). This Act provides broader exemptions than

Any legislative effort that similarly seeks to preclude certain employees of riverboat gaming vessels from asserting maritime tort claims could have significant and unintended effects. Unlike scientific personnel and sailing instructors, gaming vessel employees are extraordinarily diverse in the types of work that they perform, the kinds of vessels on which they are employed, and the levels of marine-related dangers to which they are exposed. Consequently, it would be almost impossible to draft legislation which would not contain many of the same arbitrary characteristics that exist under the current system. For instance, a statute could preclude all workers who are not directly engaged in the transportation function of a gaming vessel from being considered seamen unless the vessel is actually engaged in navigation at the time of the injury. This seems at first blush like a reasonable method of preventing card dealers, bartenders and other non-traditional maritime employees from bringing claims under the Jones Act and general maritime law while the vessel remains dockside. However, it may also prevent these employees from asserting legitimate maritime claims when admiralty jurisdiction is clearly warranted, such as when there is a collision with another vessel or an on-board explosion and fire. Past experience has shown that legislative mandates are not generally capable of satisfactorily addressing the broad range of issues and disputes that will likely emerge in the rapidly changing riverboat gaming industry.³⁷⁰

the Oceanographic Research Vessels Act by preventing sailing school instructors and students from seeking remedies under the Jones Act or the general maritime law.

³⁷⁰ The following summarizes the concern over relying too heavily on codification of the law:

[T]he infinite variety of human experience has outdistanced the most visionary of codifiers, serving up new questions never contemplated by them. Also, when the codes themselves use vague and all-embracing words (e.g., "the decision in a tort action should be awarded against the negligent party") their words do not serve adequately as guides for future litigation, and therefore court decisions relating to the codes evolve a vast detailing and specification of the ambiguous provisions.

LAKSHMAN GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER* 74 (1994).

Despite its imperfections, the present system offers the best hope of successfully and fairly arbitrating tort claims involving gaming vessels. There is every reason to believe that courts will continue to handle these disputes in a principled and generally predictable manner.

ENVIRONMENTAL CONCERNS AND THE IMPACT OF WETLANDS REGULATIONS ON MISSISSIPPI'S GAMING INDUSTRY

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With the Legislature's approval, riverboat gambling returned to Mississippi in 1992¹ and has given an economic boost to the State. As the barges have multiplied,² however,

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¹ By mid-1994, 37 states allowed lotteries and 23 allowed casinos. Gerri Hirshey, *Gambling Nation*, N.Y. TIMES, July 17, 1994, § 6 (Magazine), at 36. By the end of the 1990s, every American will probably live within a four-hour drive of a casino. *Id.*

² Margaret Litvin, *Floating Casinos Gambling with the Environment/Mississippi Riverboats Under Fire*, USA TODAY, July 7, 1994, at 8A. The first casinos

federal and state environmental agencies as well as local environmental action groups have grown more concerned about the requirement that Mississippi's casinos be water-based.³ The Mississippi gaming statute's water-based requirement clashes with the public interest of preserving wetlands stipulated in state and federal wetlands regulations.⁴ When the

opened in Mississippi in August, 1992. *Id.* Only Nevada boasts more casino space today than Mississippi. *Id.* As of July, 1994, Nevada totalled 4,501,129 square feet of casinos, while Mississippi had 1,162,406 square feet. *Id.* New Jersey, with 797,155 square feet of casinos, trailed Mississippi by almost 400,000 square feet. *Id.*

³ The Mississippi Gaming Control Act is codified at MISS. CODE ANN. §§ 75-76-1 to -313 (1991 & Supp. 1994). Also, other sections of the Mississippi Code discuss the prohibitions and penalties for gaming in Mississippi. For example, § 97-33-1 states:

However, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(c) That is legal under the laws of the State of Mississippi.

MISS. CODE ANN. § 97-33-1 (1994).

⁴ Joseph I. Gill Jr., *The Impacts Associated with Dockside Gaming in the Mississippi Coastal Zone*, 1, 2, (Sept. 14-15, 1994) [hereinafter Gill Report] (unpublished manuscript, on file with Bureau of Marine Resources) (report presented to Special Subcommittee of Mississippi Senate Environmental Protection, Conservation and Water Resources Committee).

Gill, the interim executive director of the Bureau of Marine Resources, stated that the Legislature unnecessarily created a new water-dependent industry to compete with traditional Mississippi water industries such as shrimping and fishing. *Id.* at 2. Gill stated, "Originally perceived as 'riverboat gambling' the casino industry has outgrown the small, traditional riverboats and abandoned them for what has been aptly described as 'floating football field' sized complexes. Most of these casinos are boats in name only." *Id.* at 20; see also *Gambling on Wetlands*, COM. APPEAL (Memphis), Sept. 9, 1994, at 10A (stating that since casinos need not be on mobile water vessels "the whole idea of waterbound gambling was just a disguise").

first casinos arrived in August 1992,⁵ there was little said about wetlands conservation. In late 1994, with more than thirty casinos in full operation along the Mississippi River and Gulf Coast and dozens more in the wings,⁶ the cumulative effect of the gaming industry on the State's wetlands has become a popular topic. As the Executive Director of the Mississippi Bureau of Marine Resources lamented, "It would have been better in the long run if they had let them just put their casinos anywhere instead of crowding them into that river area."⁷

As the gaming industry grows in Mississippi, state and federal agencies will more heavily scrutinize the reams of paperwork and permit applications casino developers must submit before breaking ground. This is especially true with regard to the permits which must be obtained to dredge, fill or improve any of the wetlands adjoining the Mississippi River and Gulf Coast where the casinos are required to locate by statute. These permit applications, which may be required by the Federal Water Pollution Control Act of 1972 (better known as the Clean Water Act) or the Mississippi Coastal Program or both, depending on the proposed location of the casino, will receive far greater scrutiny as the cumulative effects of Mississippi's casinos become more apparent. This paper will discuss (1) the applicable federal and state wetlands regulations and how they interrelate with Mississippi's gaming statute, (2) the permit process for dredging, filling or altering wetlands under federal and state law, and (3) the environmental concerns with which a casino developer and his attorney should be familiar to maintain a gaming operation in Mississippi.

⁵ Litvin, *supra* note 2, at 8A.

⁶ Hirshey, *supra* note 1, at 36. More than 54 Mississippi casinos could be operational at the turn of the year. *Id.*

⁷ Litvin, *supra* note 2, at 8A.

I. PRELIMINARY CONSIDERATIONS

The roots of wetlands regulation are found in nineteenth century statutes designed to ensure that the nation's waterways remained navigable as routes of commerce.⁸ The U.S. Army Corps of Engineers (the Corps) was authorized to maintain and improve certain waterway conditions to foster navigation.⁹ The Corps first became responsible for regulation of construction projects along the navigable waters of the United States when Congress adopted the Rivers and Harbors Act in 1890.¹⁰ This act, as modified in 1899, established the Corps as a regulator of activities on the navigable waters of the United States. Since then, its regulatory power has increased and, with the adoption of the Clean Water Act in 1972, the Corps became primarily responsible for federal wetlands regulation. Along the Gulf Coast, the Mississippi Bureau of Marine Resources also regulates wetland alterations pursuant to the Mississippi Coastal Program, a compilation of state statutes designed to preserve coastal wetlands and regulate the dredging and filling of wetlands.

⁸ FRANK P. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW § 3.03[6A][a], at 3-251 (1994).

⁹ *Id.* In fact, after the Civil War, navigation projects were among the largest expenditures approved by Congress. *Id.*

¹⁰ The Rivers and Harbors Act, ch. 907, 26 Stat. 426, 453-54 (1890). The Rivers and Harbors Appropriation Act, ch. 425, 30 Stat. 1121, 1151-52 (1899) (current version at 33 U.S.C. §§ 403, 407 (1988)), amended the 1890 Act. Sections 10 and 13 of the 1899 Act were the precursors to the Corps of Engineers' current wetlands regulatory powers. Section 10 states that wharves, harbors, canals and other enumerated projects along navigable waters are not permitted unless approved by the Secretary of the Army (through the Corps of Engineers). See 33 U.S.C. § 403 (1988). The Act also bans the filling or excavation of any construction project in the navigable waters of the United States unless approved by the Secretary of the Army. See *id.* Section 13 governed the discharge of "refuse" into navigable waters, but it was superseded by the Clean Water Act in 1972. See 33 U.S.C. § 407 (1970).

A. What is a Wetland?

As many authorities have noted, determining exactly what constitutes a wetland can be perplexing. Wetlands have numerous functions: forming floodways to divert or store floodwaters; acting as barriers to waves and erosion; reducing flood flow and filter pollutants; and serving as habitats or sources of nutrients for fish and shellfish, waterfowl, other wildlife and endangered species.¹¹ The Corps and the EPA define "wetlands" as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."¹² This language has remained virtually the same since 1977,¹³ but its effect has changed over time in that "drier" lands are increasingly being classified as

¹¹ BUREAU OF MARINE RESOURCES, MISS. DEP'T OF WILDLIFE, FISHERIES & PARKS, A CITIZEN'S GUIDE FOR PROTECTING WETLANDS IN MISSISSIPPI 15 (1992) [hereinafter CITIZEN'S GUIDE]. In Mississippi, the most prevalent types of wetlands include palustrine wetlands (freshwater wetlands dominated by trees and bushes) and estuarine wetlands (tidal land where freshwater runoff occasionally dilutes oceanic saltwater). *Id.* at 9-11, 19-26. Casinos primarily are placed in or adjoin estuarine wetlands along the Gulf Coast and palustrine wetlands along the Mississippi River. *Id.*

Statistics show that about 20 percent of all endangered plant and animal species depend on wetlands for food or habitats. William L. Want, *Expanding Wetlands Regulation Affects Land Development and Property Transactions*, 13 ZONING & PLAN. L. REP. 1, 2 (1990). Along the Atlantic and Gulf coasts, two-thirds of the fish and shellfish harvested commercially rely on estuarine wetlands for food and spawning grounds. *Id.*

In Mississippi, 13.3 percent of the total acreage of the state consists of wetlands. Linda Kanamine, *Wetlands Policy Appeases, Doesn't Please, Conservation Effort Includes Flood Control*, USA TODAY, Aug. 25, 1993, at 6A.

¹² 33 C.F.R. § 328.3(b) (1994) (stating Corps' definition of wetlands); 40 C.F.R. § 230.3(t) (1994) (stating EPA definition of wetlands).

¹³ In 1985, the United States Supreme Court held that this definition of wetlands and the three parameters which determine its scope are a reasonable interpretation of the jurisdiction of the Clean Water Act. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985). For a discussion of the scope of wetlands jurisdiction under the Clean Water Act, see *infra* notes 20-27 and accompanying text.

wetlands.¹⁴ Ironically, even as current classification results in more land being designated as wetlands, the acreage of the nation's wetlands is decreasing. Two hundred years ago, approximately 230 million acres of vegetative wetlands existed in the continental United States.¹⁵ Today, the figure is down to 100 million, and figures estimate that anywhere from 66,000 to 458,000 acres are lost annually.¹⁶

Despite the national decrease in wetlands acreage, critics contend that wetlands should be regulated based on their ecological value, not simply because they qualify as wetlands.¹⁷ In Mississippi, the distinction has taken on great-

¹⁴ David M. Ivester, *Guide to Wetlands Regulation*, 1 LAND USE F. 197, 199 (1992). To delineate wetlands, the Corps looks to three parameters: (1) hydrophilic vegetation: plants must be adapted to living in saturated soil; (2) the hydrology: water must inundate or saturate the soil for a specified period of time annually; and (3) hydrophilic soil: the soil must be of a type which can support and reflect the hydrology and vegetation. *Id.*

For the purposes of this paper, it is not necessary to elaborate on the technical aspects of these criteria. It is sufficient to state that wetlands issues that have arisen in connection with casinos in Mississippi do not turn on the question of whether the location of the casino is a wetland—in fact, this normally is not disputed. However, for a more in-depth, technical discussion of these factors, see 1 GRAD, *supra* note 8, § 3.03[6A][d], at 3-262.13 to .22; WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 4.03, at 4-9 to -13 (1994).

For a discussion of the ways these factors have been applied under the 1987 and 1989 manuals for delineation of wetlands and how they would be applied under proposals by the EPA and by former Vice President Dan Quayle's Council on Competitiveness, see Royal C. Gardner, *Public Participation and Wetlands Regulation*, 10 UCLA J. ENVTL. L. & POL'Y 1, 30-34 (1991); *What is a Jurisdictional Wetland?*, 13 NAT'L WETLANDS NEWSL. 5, 5 (1991).

¹⁵ Kanamine, *supra* note 11, at 6A.

¹⁶ See *A Balanced Policy on Wetlands*, PLAIN DEALER (Cleveland), Aug. 31, 1993, at 6B (stating 300,000 acres lost per year); *EPA Proposes to Fine Three Gambling Casino Developers for Clean Water Act Violations in Tunica County, Miss.*, PR NEWswire ASS'N, Sept. 30, 1993 (stating 458,000 acres lost per year); Kanamine, *supra* note 11, at 6A (stating 290,000 acres lost per year). These figures have been refuted by the findings of The National Resource Inventory, a recent government study, which found that the United States is losing only about 66,000 acres per year. Jonathan Tolman, *Attack of the Wetland Enforcers*, WALL ST. J., July 18, 1994, at A12. These new figures indicate a net gain of wetlands because the government's top three wetlands restoration projects will restore about 157,000 acres of wetlands in 1994. *Id.* Of course, this does not necessarily mean that the same types of wetlands are being restored in the same locations where other wetlands are being destroyed.

¹⁷ Jonathan Tolman, *A Sign of the Times*, WALL ST. J., Sept. 20, 1994, at

er significance—primarily on the Gulf Coast—where casinos already occupy the “approved” locations and are now eyeing more sensitive wetland areas for development.¹⁸ Regardless of how the regulations currently read, state and federal officials already seem to protect Mississippi wetlands based on their ecological value. The original casinos faced less opposition when they developed in “approved” wetland areas, but newer casino developers have more difficulty expanding further into wetland areas perceived as sensitive and ecologically important.¹⁹ This translates into closer scrutiny by the Corps when a casino developer files for a dredge and fill permit under the Clean Water Act, or by the Bureau of Marine Resources when a developer files for a dredge and fill permit under the Mississippi Coastal Program.

B. An Overview of the Clean Water Act

Whether developing a casino on the Mississippi River or on the Gulf Coast, compliance with the Clean Water Act is vital to getting the project started.

Originally known as the Federal Water Pollution Control

A22. Tolman states:

If a piece of land gets wet and stays wet for more than a few weeks a year, then it's a wetland. The Corps treats all lands that meet this definition the same regardless of their actual value to society. It makes little difference whether the area is a stagnant mosquito pond the size of a ping-pong table or acres of pristine cypress swamp. A wetland is a wetland.

Id.

¹⁸ Jim Yardley, *Around the South, Mississippi's Big Bet, Casinos Wearing Out Gulf Coast Welcome*, ATLANTA J. & CONST., June 5, 1994, at A3. The author states that “as prime commercial real estate grows more scarce and expensive, casino operators are targeting sites near residential areas or in environmentally fragile marshes.” *Id.*

¹⁹ Telephone Interview with John Winn, U.S. Army Corps of Engineers, Mobile District (Nov. 7, 1994). Winn, who supervised the Clean Water Act permit process for the first seven casinos to begin operating in Mississippi, said Mississippi officials never dreamed the gaming industry would grow at such a rapid pace. According to Winn, “Mississippi's trying to lock the barn door after the horse has been stolen—literally. There are lots of secondary impacts from the casinos now—environmental and otherwise.” *Id.*

Act of 1972, the Act was created to establish pollution control regulations and water quality standards.²⁰ The Act consists of five main elements: a permit program to regulate the discharge of dredged or fill material into navigable waters; a system of minimum national effluent standards for each industry; water quality standards; provisions for special problems such as toxic chemicals and oil spills; and a construction grant program for publicly-owned water treatment works.²¹

The EPA is primarily responsible for administering the Clean Water Act, but the permit program for two specific types of "pollutants," "dredged" material and "fill" material, is delegated to the U.S. Army Corps of Engineers.²² The section dealing with these materials, section 404,²³ most directly affects casino developers in Mississippi in that it requires a

²⁰ For a comprehensive discussion of the Clean Water Act's importance more than two decades after its enactment, see ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT TWENTY YEARS LATER* (1993).

²¹ See 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1993).

²² Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. U.S. Att'y Gen. 15 (1979). One commentator explains:

This special authority was given to the Corps for two reasons. First, the Corps had previously administered the Rivers and Harbors Act wetlands program of which the [Clean Water Act] was to be an extension or expansion. Secondly, the Corps and its legislative backers did not want the extensive Corps dredge and fill activities to be regulated by an agency other than the Corps. The Corps is, however, required to follow procedures similar to the permit process to undertake dredge and fill activities in wetlands.

WANT, *supra* note 14, § 2.02[2], at 2-8.

²³ 33 U.S.C. § 1344 (1988 & Supp. 1994). One author commented that § 404 was "[b]orn of confusion, nurtured by controversy [and] nearly scuttled before it reached maturity." Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters its Adolescence: An Institutional and Programmatic Perspective*, 8 *ECOLOGY L.Q.* 409, 410 (1980). The first five years of the program were spent primarily in "administrative, legislative, and judicial controversy and were largely devoted to defining and debating its scope of authority rather than ensuring its effective implementation." E. Gaylan McGregor, "404" and Related Permits in Oil and Gas Operations, 1989 *Current Environmental and Resource Problems in the Areas of Water, Oil and Gas Operations, and Solid Waste* 1 (Oct. 6, 1989) (unpublished manuscript, on file with University of Mississippi School of Law Library).

For discussions of various aspects of § 404 of the Clean Water Act, see articles in the Symposium, *Natural Resources Issue*, 57 U. COLO. L. REV. 445 (1985).

developer to acquire a permit from the Corps to dredge or fill navigable waters.²⁴ For the purposes of the Act, "navigable waters" is defined to mean "waters of the United States."²⁵ This definition is construed very broadly and likely includes virtually every locale permissible under the gaming statute for a water-based casino in Mississippi.²⁶ While there are some

²⁴ 33 U.S.C. § 1344 (1988 & Supp. 1994). Dredge and fill permits, therefore, would be required for any of a host of possible projects a casino developer might envision: paving a road through wetlands to the casino site, draining or levelling land and paving it to create a parking lot, or dredging the bottom of the river bed or tributary where the casino will be located to ensure the water is deep enough to accommodate the barge.

The Code of Federal Regulations defines the terms "dredged material" and "discharge of dredged material" as such:

(c) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

- (i) the addition of dredged material to a specified discharge site located in waters of the United States;
- (ii) the runoff or overflow from a contained land or water disposal area; and
- (iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

- (i) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.
- (ii) activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

33 C.F.R. § 323.2 (1994). Section 401 of the Clean Water Act also requires permit applicants to obtain water quality certification from the state. See 33 U.S.C. § 1341 (1988 & Supp. 1994).

²⁵ 33 U.S.C. § 1362(7) (1988).

²⁶ The Corps, with the acquiescence of the courts, has broadly defined "waters

types of discharges which are exempt from the permit requirement, typical casino developments do not fall within the scope of these exemptions.²⁷ Therefore, casinos must file for individual permits. This process is discussed hereinbelow.

of the United States" to include wetlands as well as rivers, lakes, streams and other readily recognizable waterbodies. 33 C.F.R. § 328.3 (1994); *see, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (holding Corps can require landowner to obtain permit before discharging fill materials into wetlands adjacent to navigable waters and their tributaries).

While initially only a water quality statute, the Clean Water Act "has been used, with some success, to accomplish a purpose for which it was not specifically designed." Ivester, *supra* note 14, at 198. Namely, § 404 has become the primary tool for federal regulation of dredging and filling of wetlands. *Id.* at 199.

Other authors suggest that the legislative history reflects that the Act *was* intended to apply to wetlands though not explicitly stated, and that the Corps' jurisdiction has not been extended beyond its original anticipated scope. *See* 1 GRAD, *supra* note 8, § 3.03[6A][b], at 3-256; *see also* FREDRICK R. ANDERSON ET AL., *ENVIRONMENTAL PROTECTION: LAW & POLICY* 445 (2d ed. 1990).

In 1977, the Act was amended. *See* Act of Dec. 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566. However, the amendments did not alter the definition of "navigable waters" or remove any wetlands from the Corps' jurisdiction. 1 GRAD, *supra* note 8, § 3.03[6A][b], at 3-260. Today, the Code of Federal Regulations specifically states that the Clean Water Act reaches three types of wetlands: (1) interstate wetlands on state borders, (2) wetlands adjacent to a body of water, and (3) isolated wetlands that, if altered or destroyed, would "substantially affect interstate commerce." Ivester, *supra* note 14, at 199 (citing 33 C.F.R. § 328.3(a)(2), (3), (7) (1992)).

For a discussion of proposals to limit the Corps' jurisdiction over wetlands and protect wetlands based on their ecological value rather than their proximity to navigable waters, *see* Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?*, 13 TEMP. ENVTL. L. & TECH. J. 81, 99-100 (1994).

²⁷ Examples of these exemptions include when the discharge results from: (1) normal farming and ranching activities; (2) maintenance of existing structures such as dikes, levees and causeways; (3) the construction or maintenance of agriculture ponds or irrigation ditches; (4) the construction of temporary sedimentation basins at a construction site so long as fill material is not dumped into navigable waters; and (5) the construction or maintenance of farm roads or temporary roads for moving mining equipment so long as the chemical and biological characteristics of the navigable waters are not impaired. 33 U.S.C. § 1344(f)(1) (1988).

C. An Overview of the Mississippi Coastal Program

In 1972, Congress enacted the Coastal Zone Management Act, a statute administered by the National Oceanic and Atmospheric Administration which encourages individual states to protect their coastal areas through implementation of state laws.²⁸ To accomplish this goal, Congress provided coastal states with financial incentives to implement protective programs.²⁹ In 1973, the Mississippi Legislature enacted the Coastal Wetlands Protection Act.³⁰ Coastal wetlands are defined as "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide; all publicly owned accretions above the watermark of ordinary high tide and all publicly owned submerged water-bottoms below the watermark of ordinary high tide."³¹

Mississippi lawmakers were concerned with the depletion of coastal wetlands,³² and, therefore, declared the State's public policy with regard to wetlands in the newly-enacted Coastal Wetlands Protection Act:

²⁸ See 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993). As expressed in one of the Congressional findings that preface the statute, "There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a) (1988).

²⁹ M. CASEY JARMAN & CATHERINE L. MILLS, MISS. L. RESEARCH INSTITUTE, UNIV. OF MISS. L. CTR., A LEGAL ANALYSIS OF MISSISSIPPI'S COASTAL WETLANDS MANAGEMENT PROGRAM 3 (1984).

³⁰ MISS. CODE ANN. §§ 49-27-1 to -69 (1990 & Supp. 1994). Mississippi's coastal wetlands are 70 miles wide and extend from Lake Borgne on the west to Mobile Bay on the east. UNIVERSITY OF MISSISSIPPI LAW CENTER, MISSISSIPPI WETLANDS PROTECTION PRACTICE AND PROCEDURE 5 (1977).

³¹ MISS. CODE ANN. § 49-27-5(a) (Supp. 1994). Coastal wetlands provide 90% of the food consumed by marine life, filter pollutants, and serve as a first defense against the impact of hurricanes moving inland. BUREAU OF MARINE RESOURCES, DEPT OF WILDLIFE CONSERVATION, MISSISSIPPI COASTAL PROGRAM GUIDE 15 (198-2) [hereinafter PROGRAM GUIDE].

³² The Bureau of Marine Resources noted in 1982 that developments in tidal marsh areas along the Coast depleted the total marsh acreage from 76,000 acres to 66,000 acres before the implementation of the Coastal Wetlands Protection Act. *Id.* at 7. "At this rate, half of Mississippi's tidal marshes would have been destroyed by 1990 if the Mississippi Coastal Wetlands Protection Act had not been passed to protect the State's wetlands." *Id.*

It is declared to be the public policy of this state to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, *except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held.*³³

Six years later in 1979, the Mississippi Legislature approved legislation directing the preparation of a comprehensive coastal program.³⁴ The result, the Mississippi Coastal Program, is administered by the Bureau of Marine Resources.³⁵

The Bureau of Marine Resources regulates three types of activities and exempts other types of activities.³⁶ First, it regu-

³³ MISS. CODE ANN. § 49-27-3 (1990) (emphasis added). While certain activities are exempted from the regulatory provisions and permitting requirements of the Coastal Wetlands Protection Act, no activity is exempt from this public policy. JARMAN & MILLS, *supra* note 29, at 4. For a discussion of the public trust doctrine as it relates to Mississippi's tidelands and beaches, see M. Casey Jarman, *Of Time, Tidelands, and Public Trust*, 57 MISS. L.J. 131 (1987).

³⁴ Today this body of law is administered by the Bureau of Marine Resources under the authority of the Mississippi Commission of Wildlife, Fisheries and Parks. The Mississippi Code provides that the older administrative title of "Mississippi Marine Conservation Commission" shall be construed today to mean the Commission on Wildlife, Fisheries and Parks. See MISS. CODE ANN. § 49-1-3 (1990). The Bureau of Marine Resources, a division of the Commission on Wildlife, Fisheries and Parks, oversees the permit processes of the Mississippi Coastal Program.

³⁵ The Mississippi Coastal Program took effect Sept. 29, 1980. PROGRAM GUIDE, *supra* note 31, at 25. Its current director summed up its purpose as "to balance developmental demands with environmental, sociocultural and economic considerations." Gill Report, *supra* note 4, at 3.

The program establishes ten goals: (1) to promote reasonable industrial expansion; (2) to preserve coastal wetlands except where a specific alteration would serve a higher public interest; (3) to protect aquatic life as it relates to the promotion of the state's seafood industry; (4) to foster air and water conservation and propagate fish and wildlife species; (5) to promote reasonable and beneficial use of the state's water resources; (6) to preserve historical and archaeological resources; (7) to encourage the natural beauty of the state's coastal areas; (8) to assist municipalities in promotion and compliance with the coastal program; (9) to consider the national public interest in coastal projects; and (10) to ensure the effective implementation in coastal areas of the public policy declared in § 49-27-3 of the Mississippi Code. CITIZEN'S GUIDE, *supra* note 11, at 35.

³⁶ "Regulated activities" requiring permits are defined as:

lates activities physically located in wetlands, such as piers, canals, pipelines, submerged cables and the filling of wetlands.³⁷ Second, it regulates activities located outside coastal wetlands that affect the wetland areas indirectly.³⁸ Finally, the Bureau of Marine Resources regulates the erection of structures on sites suitable for water-dependent industry.³⁹ These industries are divided into five "use districts," and permissible locations for the industry are determined based on the category of the industry.⁴⁰ Due to Mississippi's gaming statute, casinos must be considered a water-dependent industry and are eligible to locate in use districts set aside for either industrial development or commercial fisheries and recreational marinas.⁴¹

Dredging, excavating or removing of soil, mud, sand, gravel, flora, fauna or aggregate of any kind from any coastal wetlands; the dumping, filling or depositing of any soil, stones, sand, gravel, mud, aggregate or any kind of garbage, either directly or indirectly, on or in any coastal wetlands; killing or materially damaging any flora or fauna on or in any coastal wetlands; and the erection on coastal wetlands of structures which may materially affect the ebb and flow of the tide; and the erection of any structure on suitable sites for water dependent industry. The use of the term "indirectly" in this definition covers the possibility of activities located outside of coastal wetlands which cause dumping, filling, or depositing in coastal wetlands.

BUREAU OF MARINE RESOURCES, DEPT. OF WILDLIFE CONSERVATION, MISSISSIPPI COASTAL PROGRAM, VIII-4 to -5 (1988) [hereinafter MISSISSIPPI COASTAL PROGRAM].

The activities exempted from the permitting process include: (1) activities occurring within five feet of private property; (2) recreational activities which do not adversely affect coastal wetlands; (3) legally permissible hunting and shellfishing; (4) normal maintenance and repair of bulkheads, piers and roads; and (5) a landowner's exercise of his riparian rights. *Id.* at VIII-16 to -18; *see also* MISS. CODE ANN. § 49-27-7 (1990).

³⁷ MISSISSIPPI COASTAL PROGRAM, *supra* note 36, at VIII-22 to -30.

³⁸ *Id.* at VIII-30.

³⁹ *Id.* at VIII-20.

⁴⁰ The Bureau of Marine Resources maintains maps at its Long Beach office which indicate the use districts where various types of water-dependent industries may locate. PROGRAM GUIDE, *supra* note 31, at 16. These use districts are categorized as: (1) industrial development, (2) commercial fisheries and recreational marinas, (3) general use, (4) preservation, and (5) special use. *See* MISSISSIPPI COASTAL PROGRAM, *supra* note 36, at VIII-33 to -36 (maps of coastal counties and locations for five categories of water-dependent industry).

⁴¹ Telephone Interview with Joseph Runnels, Counsel, Bureau of Marine Re-

*D. An Overview of Mississippi's Gaming Statute and Its
Conflict With Environmental Laws*

Mississippi's gaming statute is commonly referred to as the "Mississippi Gaming Control Act."⁴² Patterned after Nevada's gaming laws, Mississippi's gaming statute is generally considered an excellent piece of legislation which is highly respected throughout the gaming industry.⁴³ By requiring gaming activities to occur only on water-based casinos, however, this statute has unintentionally created a conflict between casino developers, citizen groups and governmental regulators concerned about protection of the aquatic regions of Mississippi through strict enforcement of the various environmental laws, particularly the Clean Water Act. In order to understand how the present environmental laws impact casino gambling as authorized under Mississippi's gaming statute, it is first necessary to review how Mississippi's gaming statute developed.

There has been much speculation as to why staunch opponents of gambling allowed this statute's enactment to begin with. Some speculate that, because the law restricted gaming activities to coastal and river counties, legislators in the more traditional "Bible-belt" regions of the state felt that their constituents would be unaffected by the legislation and, therefore, either did not vote or were not openly hostile to it. Others surmise that, because Mississippi's casinos were to be limited to peripheral areas of the state, legislators presumed the casinos would be more likely to siphon off customers from neighboring states than if they were allowed in more centralized regions. In the final analysis, however, it appears that the primary explanation for lack of opposition to gaming is that most legislators

sources (Nov. 14, 1994). Runnels stated that the Bureau of Marine Resources "strongly recommends the denial of permits for casinos in general use districts." *Id.*

⁴² MISS. CODE ANN. §§ 75-76-1 to -313 (Supp. 1994).

⁴³ Bill Minor, *Dockside Gambling Legislation Would Be Difficult to Pass Now*, CLARION LEDGER (Jackson, Miss.), Feb. 28, 1994, at 3G ("[T]he Mississippi Gaming Commission statute . . . is highly respected throughout the gaming industry, attracting many of the top investors in the industry to the state. . . .").

were simply lulled to sleep during the 1990 legislative session, allowing three bills to move quietly through the legislative process and thus opening the door to dockside gambling in Mississippi.⁴⁴ It is also quite likely that no Senate or House member ever dreamed that the casino industry would mushroom as rapidly in Mississippi as it ultimately did. Nor could they have predicted that by strictly requiring water-based casinos they were setting up the casino industry for a fight with the Environmental Protection Agency and the Mississippi Department of Environmental Quality due to impacts on the state's sensitive wetland regions.

The genesis of Mississippi's entry into the gaming industry occurred in 1989 when the Senate passed Senate Bill No. 3068, which allowed cruise ships that offered gambling activities in international waters to enter Mississippi ports.⁴⁵ Also approved on March 28, 1989, was Senate Bill 3069 which allowed these cruise vessels to begin gaming activities once they were underway and making way to or from international waters, provided the vessel was 1,500 yards or more from the shore.⁴⁶ Shortly thereafter, two vessels, the L.A. Cruise and the Southern Elegance, began offshore international water gaming operations on the Mississippi Gulf Coast.⁴⁷

Although now a multi-billion dollar industry, Mississippi's initial experience in gaming, allowing shipboard gambling

⁴⁴ Interview with Bill Tann, former Mississippi State Tax Commissioner (Oct. 4, 1994). Tann was appointed by Governor Ray Mabus to the Mississippi State Tax Commission in 1990. The state gaming statute provided that the State Tax Commissioners would become the Gaming Commissioners on a temporary basis under the provisions of MISS. CODE ANN. § 75-76-7 (Supp. 1993).

⁴⁵ Senate Bill 3068 amended § 67-1-71 of the Mississippi Code by exempting from license revocation, based on the presence of gaming devices, any cruise vessels having a minimum length of 300 feet and a minimum draft of 15 feet. The bill also exempted these vessels from the common nuisance provisions under § 95-3-25 of the Mississippi Code which otherwise would have been applicable.

⁴⁶ Senate Bill 3069 amended §§ 87-1-5, 97-33-1, 97-33-25 and 97-33-27 of the Mississippi Code in order to authorize wagering on cruise vessels once in the channel and underway, and making way to or from international waters.

⁴⁷ Linda King, *An Overview of Mississippi's Gaming Legislation and Local Activities*, CENTER FOR POLICY RESEARCH AND PLANNING WORKING PAPER 9401, June 1994, at 3.

activities on "cruises to nowhere," saw revenues which were much lower than expected. At the same time, legislators from counties bordering the Mississippi River came to the 1990 legislative session armed with proposed legislation which would promote economic development in the suffering economy of that region of the state by allowing stern-wheel and paddle-wheel riverboat casinos to operate in Mississippi River ports, subject to local option approval.⁴⁸ By not requiring a vessel to leave the dock, this Bill opened the door to dockside gaming in Mississippi.⁴⁹ Senate Bill 2837 also modified requirements for a "cruise vessel," thereby allowing boats to conduct gaming activities while operating in the waters of the Gulf of Mexico by reducing the minimum size and passenger requirements.⁵⁰

On April 9, 1990, the approval of Senate Bill 2744 changed the state gaming law pertaining to cruise vessels whereby such vessels no longer had to travel to international waters in order to operate legally. Instead, these cruise vessels simply had to be underway in state waters adjacent to the state's three (3) southernmost counties, "and in which the registered voters of the county in which the port [was] located [had] not voted to prohibit" gambling as provided in section 19-3-79 of the Mississippi Code.⁵¹ Dockside gaming in these coastal counties (as it

⁴⁸ Senate Bill 2837, passed on March 20, 1990, amended § 27-109-1 of the Mississippi Code by providing new requirements for any "vessel" meeting all U.S. Coast Guard regulations and having a minimum overall length of 150 feet, a minimum draft of six feet and a minimum passenger load of 200 people. Said vessels could allow gaming activities as long as the vessels were situated on the Mississippi River or in navigable waters within a county bordering on the Mississippi River. Nowhere in the bill was it mentioned that the vessel had to be underway.

⁴⁹ Minor, *supra* note 43, at 3G. Minor notes in his article that Sen. Bob Dearing of Natchez authored Senate Bill 2837 which by two votes sneaked through the Senate almost unnoticed and went on to the House, where some delicate surgery was performed on it in the House Ways and Means Committee. When it reached the House floor, deftly removed was the requirement that the riverboat be "underway" before gambling could start. Thus, riverboat casinos on the Mississippi River would not have to leave the dock (or even have an engine, as it later turned out). The House bill also covered any county along the Mississippi River.

⁵⁰ See *supra* notes 45, 48.

⁵¹ King, *supra* note 47, at 5.

now exists), however, still was not allowed.

When the Gulf Coast legislators saw that the Legislature had given the Mississippi River counties dockside casino gaming, they wanted the same for the coastal counties. Those counties already had cruise gambling ships, which had to be underway before gambling could commence. A special legislative session in late June, 1990, altered that.⁵² House Bill 2 provided for the regulation, licensing and taxation of legal gaming within the state and authorized the creation of the Mississippi Gaming Commission. The bill also enacted a major amendment which allowed dockside gaming aboard vessels on the Mississippi Gulf Coast by eliminating the requirement that gaming on the Coast be conducted only while a cruise vessel was underway in waters within the Mississippi Sound. In addition, the bill modified the necessary standards for a vessel by no longer requiring compliance with U. S. Coast Guard regulations, and redefined the term "navigable waters". Under these new requirements, barges became approved "vessels" for casino activities, and under the new liberal definition of "navigable waters," it became possible to dig canals in counties along the Mississippi River and thereby "dock" a gaming boat by surrounding it with water.⁵³

Passage of these three bills in 1990 permitting dockside casino gambling occurred despite vigorous public opposition to the whole concept of legalized gambling. During the late 1980s and into the 1990 legislative session, there was great interest in the possibility of allowing a state lottery. The Southern Baptist Convention was the chief opponent of such a move, and it mounted a vigorous lobbying effort against the legalization of a

⁵² Minor, *supra* note 43, at 3G.

⁵³ King, *supra* note 47, at 6. The term navigable waters was defined as "any rivers, creeks, bayous or other bodies of water within any county in this state bordering on the Mississippi River that are used or susceptible of being used as an artery of commerce in which either in their natural or improved condition are used or suitable for use as an artery of commerce or are used for the docking or mooring of a vessel, notwithstanding interruptions between the navigable parts of such rivers, creeks, bayous or other bodies of water by falls, shallows or rapids compelling land carriage." *Id.*

state lottery.⁵⁴ That the Legislature of this Bible-belt state could create what has now become "Las Vegas South," despite the watchful lobby of the Southern Baptist Convention, is another remarkable aspect of the Mississippi gaming statute's history. Some legislative historians believe that the Baptist lobby at the time was so focused on stopping a state lottery that the riverboat casino bill slid right through.⁵⁵

The specific requirement in the Mississippi gaming statute which requires all casinos to be located on water, either along the Mississippi River or the Gulf of Mexico, has ignited the current battle between the casino developers and the federal and state regulators who are determined to protect the fragile aquatic ecosystems naturally situated adjacent to gaming site locations. At the present time, this environmental confrontation will only be exacerbated by the Mississippi Gaming Commission's policy that approval of any future casino licenses or renewals will be predicated upon a commitment to construct ancillary land-based facilities such as hotels, restaurants and golf courses.

II. THE ENVIRONMENTAL IMPLICATIONS OF ESTABLISHING A CASINO IN MISSISSIPPI: THE PERMIT PROCESS

As the number of casinos along the Gulf Coast and Mississippi River increases, the process for obtaining permits to dredge, fill or alter wetlands in preparation for new casino sites will become more heavily scrutinized. On the Gulf Coast, the use districts where casinos are permitted are reaching full capacity, and casino developers are eyeing locations near residences or ecologically sensitive marshlands.⁵⁶ Along the Mississippi River, the most acceptable sites for casinos are taken, and the U.S. Army Corps of Engineers is reluctant to permit the dredging or filling of more sensitive wetlands.⁵⁷

⁵⁴ King, *supra* note 47, at 3.

⁵⁵ Minor, *supra* note 43, at 3G.

⁵⁶ Yardley, *supra* note 18, at A3.

⁵⁷ Telephone Interview with John Winn, *supra* note 19. Winn said no one—neither Mississippi officials nor the Corps—expected such a saturation of the accept-

A. The Clean Water Act Section 404 Permit Process

1. Types of Permits

Whether located on the Mississippi River or on the Gulf Coast, casino developers are required to obtain a section 404 permit before dredging or filling any wetlands or waters.⁵⁸ The Corps offers "general permits"⁵⁹ and "nationwide permits" which do not require compliance with a formal permit process when minor work is planned that has only "minimal individual and cumulative environmental impacts."⁶⁰ However, it would be rare for a casino's plans to constitute such minor work that

able casino sites so quickly. Despite the rise of casinos and the concern over their growing domination of Mississippi's waterways, the Mississippi Legislature appears unwilling to put a cap on the number of casinos allowed.

There's the question of how viable a chance moratorium legislation has of passing. In 1993, there was an effort to further define where casinos could locate, and it wasn't just killed—it was buried 10 feet under, so I do not believe such legislation has any more chance of passing than it did then.

Nita C. McCann, *Senate Environmental Committee Briefed on Casinos*, MISS. BUS. J., Oct. 3, 1994, at 10 (quoting Sen. Mike Gunn, chairman of the Senate Environmental Committee).

⁵⁸ Along the Gulf Coast, the Coastal Program permit must be issued first by the Bureau of Marine Resources, then the Corps considers the 404 application. Telephone Interview with Joseph Runnels, *supra* note 41.

⁵⁹ 33 C.F.R. § 320.1(c) (1994) states in part:

The term "general permits" as used in these regulations (33 CFR Parts 320-330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the Federal Register and are applicable throughout the nation If an activity is covered by a general permit, an application for a [Department of the Army] permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a [Department of the Army] permit.

33 C.F.R. § 320.1(c) (1994).

Approximately 75,000 "minor activities" are authorized annually through nationwide and general permits. ENVIRONMENTAL PROTECTION AGENCY, QUESTIONS AND ANSWERS ON THE PROPOSED REVISED FEDERAL MANUAL FOR WETLANDS DELINEATION 1 (1991).

⁶⁰ WANT, *supra* note 14, § 5.03[1], at 5-7.

an "individual permit" was not deemed necessary by the Corps.⁶¹ Several months ago, a proposal to establish a general permit for casinos in the Tunica County area was suggested in conjunction with plans for the casinos to create "mitigation banks"⁶² to restore depleted wetlands. However, the proposal was rejected by the EPA.⁶³

⁶¹ There are currently 40 nationwide permits. 33 C.F.R. § 330 app. A (1994). The most controversial of these, Nationwide Permit No. 26, may exempt a small casino operation from the individual permit process if it is located in isolated wetlands or a waterbody "above the headwaters of non-tidal rivers and streams." WANT, *supra* note 14, § 5.03[3][a], at 5-13. The controversy stems from the fact that so many wetlands are lost annually under this permit. 1 GRAD, *supra* note 8, § 3.03[6A][g] at 3-262.95. Nationwide Permit No. 26 allows:

Discharges of dredged or fill material into headwaters and isolated waters provided:

- a. The discharge does not cause the loss of more than 10 acres of waters of the United States;
- b. The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. *For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands.* (Also see 33 CFR 330.1(e)); and
- c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the [Department of the Army].

33 C.F.R. § 330 app. A (1994) (emphasis added).

If the Corps must be notified pursuant to this language, the Corps then has 30 days to decide whether to allow the activity under the nationwide permit or to require an individual permit. Ivester, *supra* note 14, at 200. For a discussion of the various activities allowed by nationwide permits, see 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 189-93 (1986).

⁶² Mitigation is discussed in detail *infra* notes 114-31 and accompanying text.

⁶³ Tom Charlier, *Corps Maps Shortcuts for Casino Projects*, COM. APPEAL, (Memphis) May 4, 1994, at 1A [hereinafter *Shortcuts*]. The general permit would eliminate the comment period required for individual permits, eliminate the need for consultation with other federal agencies before granting permits, and cut the time required for obtaining a permit down to as little as two weeks. *Id.* This idea raised the ire of some, and an editorial in the Commercial Appeal newspaper pondered, "The natural question is why special favor is being granted the gam-

2. The Process

The individual permit process normally takes about three months, but may take longer for more complex activities.⁶⁴ It begins with the filing of the application. In Mississippi, a five-page federal-state application can be submitted which will be used by the Corps, the Bureau of Marine Resources and the Office of Pollution Control, which is supervised by the Mississippi Department of Environmental Quality.⁶⁵ The Corps intended the application to be relatively non-technical⁶⁶ and, in furtherance of that goal, the drawings of the proposed activity and vicinity maps which are to be submitted must be such that "a non-professional person can look at them and understand exactly what's involved in the project."⁶⁷

bling halls, while other land-owners have to plod along without any handy shortcuts through the bureaucratic brambles." Commercial Appeal Editorial Board, *Why Are Casinos Special?*, COM. APPEAL (Memphis), May 6, 1994, at 61A. One Tunica County resident stated, "If a farmer wanted to go into a wetland and do what the developers are doing, the government would hang him." *Id.*

In September, the EPA joined the U.S. Fish and Wildlife Service in refusing to go along with the plans for the mitigation bank proposed by Tunica County casinos, thereby eliminating the chances of developing a general permit since such a permit was contingent on creation of the mitigation bank. Tom Charlier, *EPA Will Bar Casino Plan to Mitigate Miss. Harm*, COM. APPEAL (Memphis), Sept. 7, 1994, at 1B [hereinafter *Mitigate Miss. Harm*]. However, the EPA stated that it might consider a revised mitigation plan. *Id.* Therefore, the general permit plan might be reconsidered at a later date.

⁶⁴ U.S. ARMY CORPS OF ENGINEERS REGULATORY PROGRAM APPLICANT INFORMATION 4 (1985) [hereinafter CORPS APPLICANT INFORMATION]. The application instructions state that "it is often helpful to have a 'pre-application consultation' or informal meeting with the Corps . . . [at which the applicant] may receive helpful information . . . which could prevent delays later." *Id.*

⁶⁵ See JOINT APPLICATION AND NOTIFICATION 1. The language at the beginning of the application states that the form is to be used "for proposed activities in the waters of the United States and Mississippi and for the erection of structures on suitable sites for water-dependent industry." *Id.*

⁶⁶ *Id.* at 1-4. Each section of the application requesting information is phrased in non-technical language and walks the applicant through the questions that must be answered in order to receive a permit. *Id.*

⁶⁷ Telephone Interview with John Winn, *supra* note 19. Winn stated, "We shouldn't need an engineer to understand them. They should be understood by any lawyer or other person who looks at them." *Id.*

Within fifteen days of receiving all information, the Corps issues a public notice.⁶⁸ This comment period, during which the proposal may be reviewed by the public, federal agencies, state agencies, local agencies and special interest groups, normally lasts between two weeks and one month, but can be extended if the Corps determines that more information is required of the applicant.⁶⁹ Comments offered during this period are then considered by the district engineer.⁷⁰

In deciding whether to grant the permit, the district engineer evaluates the following criteria: (i) the relative extent of the public and private need for the proposed activity; (ii) the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity;⁷¹ and (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses to which the area is suited.⁷²

⁶⁸ CORPS APPLICANT INFORMATION, *supra* note 64, at 7; Telephone Interview with John Winn, *supra* note 19.

⁶⁹ CORPS APPLICANT INFORMATION, *supra* note 64, at 7.

⁷⁰ *Id.* The district engineer also can consult with other federal agencies where appropriate, or organize a public hearing if necessary. *Id.*

⁷¹ The district engineer also takes into consideration any mitigation efforts planned by the applicant in order to compensate elsewhere for this loss of wetlands. The effects of mitigation are discussed *infra* notes 114-31 and accompanying text.

⁷² CORPS APPLICANT INFORMATION, *supra* note 64, at 8. For a discussion of the review standards of the Corps for § 404 permits, see Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 LAND & WATER L. REV. 43, 60-68 (1982).

The Corps' guidelines for evaluating a permit application are found at 33 C.F.R. § 320.4 (1994). The guidelines state in part:

(a) Public Interest Review.

(1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to

In weighing these criteria, the district engineer takes into account the effect the activity will have on such items as wetlands, aesthetics of the area, aquatic and wildlife preservation, erosion, water quality and conservation, and the needs of local residents.⁷³

Commentators have noted:

If a practicable alternative to a proposed project is available

occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources

(2) The following general criteria will be considered in the evaluation of every application: (i) The relative extent of the public and private need for the proposed structure or work; (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal

(b) Effect on wetlands.

(1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest

(2) Wetlands considered to perform functions important to the public interest include: (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species; (ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges; (iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics; (iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars; (v) Wetlands which serve as valuable storage areas for storm and flood waters; (vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas; (vii) Wetlands which serve significant water purification functions; and (viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

33 C.F.R. § 320.4 (1994).

⁷³ *Id.*

that will have a less adverse effect on the environment, then the permit will be denied Whenever the planned project is not water dependent, a permit applicant must clearly demonstrate that there is "no practicable alternative to the proposed discharge which would have a less adverse impact on the ecosystem."⁷⁴

Obviously, the consideration of practicable alternative locations poses problems with regard to casinos since they are required by statute to be water-based. Also, the alternative locations which previously existed for proposed casinos are rapidly dwindling as the casino industry expands. While the first seven casinos obtained section 404 permits with relative ease, this has changed as more casinos have opened along Mississippi's waterways.⁷⁵

3. *The Corps' Decision*

If the Corps decides to grant a permit over the objections of another federal agency, it must notify that federal agency in advance and give it an opportunity to reiterate its concerns to the Corps. If the federal agency still contests the decision, a district engineer may ask someone in a higher position of authority within the Corps to review the permit application.⁷⁶ Even if a permit is approved by the Corps, the decision can be overturned by the EPA pursuant to the EPA's power as Clean

⁷⁴ Kathiann M. Kowalski & Susan E. Wuorinen, *How to Avoid Being Bogged Down in Wetlands Regulation: Some Practical Suggestions for the Developer*, 13 CONSTRUCTION LAW, 3, 4 (1993). This language interprets the EPA's § 404(b)(1) guidelines. See 40 C.F.R. § 230.10(a) (1993). The full text of the applicable definitions and guidelines for determining whether a permit should be issued are found at 40 C.F.R. §§ 230.1-.77 (1993).

⁷⁵ Telephone Interview with John Winn, *supra* note 19. Winn handled the permit applications of the first seven casinos to open in Mississippi. He noted that the level of scrutiny has increased because of the cumulative impacts of the ever-growing casino industry. *Id.*

⁷⁶ Memorandum of Agreement Between the Department of Commerce and the Department of the Army (March 25, 1986); Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Nov. 12, 1985); Memorandum of Agreement Between the Department of the Interior and the Department of the Army (Nov. 8, 1985).

Water Act "Administrator" under section 404(c).⁷⁷

B. The Mississippi Coastal Program Permit Process

While it is necessary to obtain approval from both the U.S. Army Corps of Engineers under the Clean Water Act, and the Bureau of Marine Resources under the Mississippi Coastal Program, for proposed activities along the Gulf Coast, this does not require any more paperwork than would a permit application directed solely to the Corps for a Mississippi River casino development.

1. The Process

As mentioned above, the application filed for a section 404 permit is a federal-state joint application.⁷⁸ Part 13 of the application provides space to explain the permit sought/approved by each state or federal agency, and part 15 of the application requests assurance by the applicant that the proposed activity "complies with the approved Mississippi Coastal Program and will be conducted in a manner consistent with the program."⁷⁹ Regardless of the location of the proposed activity, copies of the application are submitted to the Corps' Mobile and Vicksburg District offices and one copy is sent to the Bureau of Pollution Control. In addition, if the proposed activity is located in any of Mississippi's coastal counties—Hancock, Harrison, or Jackson counties—the applicant is instructed to send a copy of the completed application along with the appropriate fees (as determined by the use district of the proposed activity) to the Bureau of Marine Resources in Biloxi, Mississippi.⁸⁰

The reviewing agency will issue a public notice once the

⁷⁷ 33 U.S.C. § 1344(c) (1988). In recent years, the EPA has exercised more authority in the realm of § 404 permits for wetlands. *Want, supra* note 11, at 5. Under § 404(c), the EPA has the power to make jurisdictional determinations and handle the permit process itself rather than the Corps. *Id.* The EPA also has veto power over the Corps' permit decisions. *Id.*

⁷⁸ See *supra* note 65 and accompanying text.

⁷⁹ JOINT APPLICATION AND NOTIFICATION 3.

⁸⁰ *Id.* at 4. The fee for a proposed activity in a commercial or industrial use district, the traditional location for casinos, is \$500. *Id.*

completed application is received.⁸¹ The Bureau of Marine Resources has sixty days to issue the public notice, unlike the fifteen-day limit within which the Corps is required to file its public notice under section 404.⁸² Similar to the Corps guidelines, the Bureau of Marine Resources can schedule a public hearing if the Bureau determines a need for a hearing, an objection is filed, or the applicant requests a hearing.⁸³

2. *The Bureau's Decision*

The Mississippi Coastal Program delineates several factors the Bureau of Marine Resources must consider in granting a permit. With regard to wetlands, the approval of a permit must be based on one or more of three criteria:

- i. No significant environmental impacts would occur, no practicable, alternative sites exist and the public interest in the protection of coastal wetlands is not adversely affected;
- ii. The activity renders a significant benefit to the public, impacts to the environment have been minimized, all interested parties were notified and a public hearing took place; or
- iii. The change in wetlands conditions is temporary and will be restored to its original status after the activity is complete.⁸⁴

The Bureau also must consider the various applicable declarations of the state's public interest as contained in statutes or court decisions. The most obvious public interest that must be considered is the public policy declared by the Coastal Wetlands Protection Act, which provides that the state "favor[s] the preservation of the natural state of the coastal wetlands and their ecosystems . . . except where a specific alteration of specific coastal wetlands would serve a higher public interest."⁸⁵

⁸¹ MISSISSIPPI COASTAL PROGRAM, *supra* note 36, at VIII-10 to -11.

⁸² *Id.* at VIII-11; *see supra* notes 68-70 and accompanying text.

⁸³ MISSISSIPPI COASTAL PROGRAM, *supra* note 36, at VIII-11.

⁸⁴ *Id.* at VIII-12 to -13.

⁸⁵ MISS. CODE ANN. § 49-27-3 (1990); *see also supra* notes 31-32 and accompanying text. The Mississippi Coastal Program provides a checklist of factors that weigh for/against the issuance of a permit. *See* MISSISSIPPI COASTAL PROGRAM,

3. *Serving a Higher Public Interest?*

While the permit applications are no more difficult to complete for coastal sites, obtaining permits is becoming more difficult as the number of appropriate casino sites dwindles.⁸⁶ The Bureau of Marine Resources has traditionally permitted casinos to locate in commercial or industrial use districts.⁸⁷ However, the Bureau is now faced with a new dilemma:

Many of the prime waterfront commercial and industrial sites have already been developed into casinos or are in the process of being developed. Unfortunately, many of the remaining gaming sites are not environmentally suitable or use-plan-compatible for casino development. Many of the proposed casino sites are located in fragile, estuarine systems that serve as vital nursery, feeding and spawning grounds for virtually all important commercial and sport species of finfish and shellfish found in Mississippi waters or are located adjacent to residential communities.⁸⁸

Part of the difficulty in obtaining a permit is also due to the conflict with the state's public interest in preserving wetlands, and the Bureau is wary of the argument that more sensitive estuarine areas should be destroyed so the Coast can add another casino to its already extensive collection.⁸⁹ The merits of such an argument by the casinos will be tested soon, since the Sierra Club Legal Defense Fund (Sierra Club), based in Washington, D.C., filed suit in November against the Army Corps of Engineers and the EPA to enjoin the issuance of a

supra note 36, at VIII-14 to -15.

⁸⁶ See Gill Report, *supra* note 4, at 5; see also Shep Montgomery, *Federal Regulators Consider Casinos's Impact on Coast*, MISS. BUS. J., May 9, 1994, § 1, at 1 (stating that casinos favor amending Coastal Zone Management Plan to allow casinos to build in use districts that are not traditionally commercial or industrial).

⁸⁷ Telephone Interview with Joseph Runnels, *supra* note 41. The Bureau has strongly discouraged casinos from applying for permits to locate in other use districts. *Id.*

⁸⁸ Gill Report, *supra* note 4, at 5.

⁸⁹ *Id.*

permit for Spectrum Gaming to develop a casino on the Back Bay in Biloxi. Sierra Club filed suit on behalf of Gulf Islands Conservancy, a Saucier, Mississippi-based environmental group, and the Center for Marine Conservation in Washington, D.C., in an effort to prevent casinos from moving into more sensitive wetlands areas.⁹⁰

Finally, a new wrinkle has emerged in the contest for permits along the Gulf Coast. In order to avoid the jurisdiction of the Mississippi Coastal Program, several casino developers are pursuing plans to place casinos in manmade basins that are only marginally connected to coastal wetlands by manmade canals. Such a plan also circumvents the original intent of the gaming statute since the developers are creating bodies of water in dry areas to satisfy the statute's water-based requirement.⁹¹ Whether such a plan will work remains to be seen.

III. THE ENVIRONMENTAL CONCERNS OF MAINTAINING A CASINO IN MISSISSIPPI

Once licensed and open for business, the casino developer is not free of his environmental obligations. He and his attorney⁹² must remain knowledgeable on several important issues, regardless of whether the developer plans to maintain his current operation as it exists, expand his business through the construction of land-based operations, or eventually construct a second casino at another location.

⁹⁰ Complaint at 1-2, *Gulf Islands Conservancy, Inc. v. United States Army Corps of Eng'rs*. The lawsuit was filed November 30, 1994, in the District of Columbia District Court. *Id.* Lynn Sferrazza, associate attorney with Sierra Club, told a Jackson newspaper, "We're not anti-casino, we're not anti-development. We're challenging things that are built in wetlands. Our concern is with the water quality, the habitat." Steve Walton & Lee Ragland, *Environmental Advocates Fight Casino Growth in Wetlands*, CLARION-LEDGER (Jackson, Miss.), Dec. 20, 1994, at 1A, 17A.

⁹¹ Gill Report, *supra* note 4, at 5.

⁹² An article in a legal newspaper earlier this year discussed the booming field of casino representation in Mississippi. See Gary Taylor, *Gaming Industry a Legal Jackpot*, NAT'L L.J., Feb. 28, 1994, at 1. The author noted, "There is no other industry in Mississippi where a lawyer can make as much money." *Id.*

A. General Wetlands Concerns

As wetland acreage nationwide continues to decline and casinos continue to multiply in Mississippi, it is inevitable that closer scrutiny will be focused on the cumulative impacts riverboat casinos have on the environment.⁹³ A 1994 survey of Mississippi Coast residents revealed that sixty-one percent believe the economic effects of the casinos are positive.⁹⁴ However, eighty-four percent said more state regulation is needed to protect wetlands.⁹⁵ In Arkansas, officials point to Mississippi with distaste and, invoking the preservation of wetlands and protection of endangered species, argue against allowing casinos.⁹⁶ In Illinois, where officials recently considered allowing riverboat gambling, environmental groups proclaimed that requiring such an industry to be water-based was absurd.⁹⁷

With each new permit application filed, federal and state agency review will become more meticulous. This newfound scrutiny will largely be the result of one fact: As more casinos move to occupy the state's last remaining "acceptable" wetland sites, the time when casinos will demand entry to the state's most sensitive wetlands creeps closer.⁹⁸ And, as noted above,

⁹³ *Compromise on the Wetlands*, WASH. POST, Aug. 27, 1993, at A24. The authors of the editorial note:

The wetlands regulations are one of the points at which this country tries to reconcile the demands of its ecology with the impact of a rapidly rising population. Highways and housing keep pushing out into lovely spots near the water—which are also areas important to the natural preservation of water quality and to the propagation of many varieties of wild plants, animals and birds.

Id.

⁹⁴ Hirshey, *supra* note 1, at 36 (citing survey conducted by Sun Herald newspaper in Biloxi).

⁹⁵ *Id.*

⁹⁶ Joan I. Duffy, *Casino Could Hurt Island's Ecology*, Says Ark. Atty. Gen., COM. APPEAL (Memphis), Feb. 26, 1994, at 1B.

⁹⁷ Jack Darin, *Don't Menace Waterways for Gambling*, CHI. TRIB., June 16, 1994, at A30 (letter to editor written by field representative of Illinois chapter of Sierra Club). The author stated that such environmental damage was "clearly unnecessary." *Id.*

⁹⁸ See *supra* notes 18-19 and accompanying text.

the first lawsuit to prevent such advances by casino developers has already been filed in Washington, D.C.⁹⁹

1. *Cumulative Effects on Wetlands*

The cliché, "The early bird catches the worm," may become a rueful truism for Mississippi casino developers. One of the largest stumbling blocks to new casinos opening in Mississippi today is that there are dozens of casinos already occupying and altering wetlands.

New permit applications are considered in light of not only what impacts the new casino might have on the environment, but also in light of how one more casino will add to the cumulative effects the entire casino industry has on the state's wetlands.¹⁰⁰ Given the fact that experts say the average casino affects the environment in much the same way as a small town,¹⁰¹ it is clear that newcomers will endure greater scrutiny by federal and state regulators. The Bureau of Marine Resources noted these cumulative effects in a recent report to the Mississippi Senate Environmental Protection, Conservation and Water Resources Committee:

It is important to realize that there is a threshold where many apparently insignificant environmental changes will reach a cumulative level that will result in irreversible degradation of the estuarine system. One casino and its associated impacts may not damage the coastal waters beyond the point of recovery, but the impacts associated with 25 or 30 casinos especially if they are allowed to locate in our more fragile bay systems could be very serious.¹⁰²

⁹⁹ See *supra* note 90 and accompanying text.

¹⁰⁰ "The decision whether to issue a permit will be based on an evaluation of the probable impacts, *including cumulative impacts*, of the proposed activity" 33 C.F.R. § 320.4(a)(1) (1994) (emphasis added). However, as recently as 1990, the Corps admitted that it did not give adequate consideration in the permit process to cumulative impacts. Ted Griswold, *Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139, 156-57 (1990).

¹⁰¹ Montgomery, *supra* note 86, at 1.

¹⁰² Gill Report, *supra* note 4, at 13.

The EPA first stepped in to assert its authority as Clean Water Act administrator over "wayward casinos" in September 1993, when it fined three casinos for the unauthorized discharge of fill material in Tunica County.¹⁰³ Some have argued that the Corps' recent scrutiny of cumulative effects comes too late.¹⁰⁴ However, it was not until recently that the cumulative effects became apparent. This was due in large part to the fact that no one expected the casino industry to swell so rapidly in such a short span of time.¹⁰⁵

Tunica County, once dubbed "America's Ethiopia" by Jesse Jackson,¹⁰⁶ is one of the more peculiar areas as far as the impacts from the casino boom are concerned. The EPA has admitted that the environmental damage done by casinos near Tunica has been "relatively light" because those areas were cleared years ago to be utilized by farmers.¹⁰⁷ But a new problem has

¹⁰³ *EPA Proposes to Fine Three Gambling Casino Developers for Clean Water Act Violations in Tunica County, Miss.*, PR NEWSWIRE ASS'N, Sept. 30, 1993.

¹⁰⁴ A supporter of the environmental group Mississippi River Coalition stated, "The Corps was supposed to require these developers to submit plans that would be less damaging, and they never did until we came along. By the time we had made enough noise, they had already granted a majority of the permits." Laurel S. Walters, *A Mississippi County Grows Casinos Instead of Cotton*, CHRISTIAN SCI. MONITOR, Sept. 13, 1994, at 10.

¹⁰⁵ Telephone Interview with John Winn, *supra* note 19. Winn stated:

No one ever expected this. Now, you've got lots of secondary impacts in the state—everything from property costs rising and the cost of living skyrocketing to environmental problems. There are cities that can't handle the extra wastewater, and a couple of casinos have even gotten in trouble by violating the National Historic Preservation Act.

Id.

¹⁰⁶ Walters, *supra* note 103, at 10.

¹⁰⁷ Tom Charlier, *Wetlands OK'd for Use as Casino Road*, COM. APPEAL (Memphis), March 12, 1994, at 1B. The EPA's assessment of the Tunica County wetlands stated that the area was of low to moderate quality and the casinos would have "a very small effect" on the area. *Id.* Of course, the damage may not seem light to local residents. One farmer said the fields surrounding his property are marked by huge holes where dirt has been excavated and he regularly clears raccoons, possum and deer roadkill off the road near his house. Tom Charlier, *Pollution from Casinos Stirring up More Concern*, COM. APPEAL (Memphis), Jan. 17, 1994, at 1A [hereinafter *Pollution From Casinos*]. Another resident said the cofferdams built to keep the barges afloat deter natural drainage in the area.

arisen in Tunica: As more casinos open closer to Memphis, the original, smaller gambling boats closer to Tunica are losing profits and closing.¹⁰⁸ Today, casino developers are "abandoning barges high and dry in the Mississippi cotton fields."¹⁰⁹

The Gulf Coast also has come a long way since late 1992 when the first casino lowered its gangplank and solicited high rollers. The economic boost was hard to ignore, but now many have found the stakes to be too high where the state's coastal wetlands are concerned.¹¹⁰ Because the commercial and industrial use districts along the Gulf Coast are reaching capacity and casino developers are eyeing sensitive tidal marshes, the EPA is considering ordering an environmental impact statement (EIS) of the casino industry in Mississippi.¹¹¹ If an EIS is ordered, the EPA could freeze casino development in the state until the investigation is complete.¹¹² The recent lawsuit filed by the Sierra Club will only focus more scrutiny on this issue. The EPA official who has the final word in determining whether an EIS is appropriate stated, "When you look at the magnitude of the potential impacts, that's where we have be-

Litvin, *supra* note 2, at 8A.

¹⁰⁸ Walters, *supra* note 104, at 10.

¹⁰⁹ *Id.* This coincides with an observation by the executive director of the Bureau of Marine Resources, who stated that another problem casinos pose is that they are often located several hundred feet from water in manmade basins connected to navigable waters only by access channels. "Dredging channels through marshes and constructing basins within wetland areas will be detrimental to the estuarine system." Gill Report, *supra* note 4, at 6. The dredging of canals also: (1) causes saltwater intrusion in freshwater areas, (2) creates low-oxygenated waters because there is little water exchange in the dead-end canals, and (3) disrupts non-tidal wetlands occupied by coastal wildlife and migratory birds. *Id.* at 7-11.

¹¹⁰ Litvin, *supra* note 2, at 8A. It is clear that wetlands alteration and destruction are not the only problems associated with Gulf Coast casinos. *Id.* According to the Harrison County Wastewater District, every operational casino in Biloxi violated sewage discharge laws in March 1994. Montgomery, *supra* note 86, at 1.

¹¹¹ *Id.*; see also *EPA Plans Meeting to Discuss Permits for Miss. Casinos*, COM. APPEAL (Memphis), Feb. 9, 1994, at 3B (stating EPA first considered ordering comprehensive report on environmental impact of casinos in early 1994).

¹¹² Montgomery, *supra* note 86, at 1. At best, an EIS can be completed within 15 months. However, an EIS also can take as long as five years. *Id.*

come concerned It's kind of like the difference between a few elephants running through your neighborhood and a whole herd."¹¹³

2. Mitigation Banking and No Net Loss of Wetlands

One means of compensating for wetlands loss is through mitigation. Former President Bush stated in 1989 that, as the "Environmental President," he would advocate "no net loss" of wetlands.¹¹⁴ The catch phrase was reiterated by President Clinton in late 1993, and has become a national goal.¹¹⁵ Simply put, no net loss requires developers to (1) avoid destroying wetlands by using alternative locations/methods, (2) minimize losses as much as possible, (3) as a last resort, if there are no practicable alternatives, compensate for the loss of wetlands through mitigation.¹¹⁶ Mitigation requires replacing lost

¹¹³ *Id.* (quoting John Hankinson, Region 4 administrator of EPA).

¹¹⁴ President George Bush, Remarks to Ducks Unlimited members at the Sixth International Waterfowl Symposium (June 6, 1989), in U.S. FISH AND WILDLIFE SERVICE, *WETLANDS: MEETING THE PRESIDENT'S CHALLENGE* (1989).

¹¹⁵ Kanamine, *supra* note 11, at 6A; *Compromise on the Wetlands*, *supra* note 93, at A24.

¹¹⁶ Adler, *supra* note 20, at 212-13; 1 GRAD, *supra* note 8, § 3.03[6A][e], at 3-262.59 to .62; Lawrence R. Liebesman, *Clean Water Act's Section 404 Dredged and Fill Material Discharge Permit Program—Overview*, 1992 CONF. ON WETLANDS L. & REG. 17-18 (materials from seventh annual conference of Natural Resources, Energy and Environmental Law and Environmental Law Water Quality Committees of American Bar Association).

Theoretically, mitigation plans by a developer are not considered a factor in the permit process; rather, they are discussed after the permit process is complete. This apparently is designed to ensure that developers don't in effect "buy" a permit by promising to create X number of wetlands elsewhere. See generally WANT, *supra* note 14, § 6.10[3]-[5], at 6-31 to -35. However, not all commentators believe the Corps has taken the high ground. See, e.g., Griswold, *supra* note 100, at 158-59; Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,212, 10,213 (June 1990). Houck stated, "[I]n the field, in the Corps' wetlands districts, the name of the game was Let's-Make-a-Deal." Houck, *supra*, at 10,213.

Houck also noted that the Corps and the EPA announced that avoidance or mitigation may not be practicable in a development involving a high proportion of wetlands. *Id.* at 10,214 (citing Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning the De-

wetlands, usually on a one-to-one ratio, with the creation of new wetlands, preferably on-site or in the same geographic location.¹¹⁷

Casino developers in Mississippi have embraced the idea of mitigation, and they can quickly cite the number of acres of wetlands they plan to restore in exchange for the wetlands they altered for their casino site.¹¹⁸ Particularly near Tunica, the current debate is over whether to establish a mitigation bank.¹¹⁹ Mitigation banks, which are supported by President Clinton,¹²⁰ are more appealing to developers than individual mitigation projects because the developer is not responsible for purchasing and creating wetlands.¹²¹ The developer merely buys credits in a larger, ongoing wetlands restoration project.¹²² Such projects are often created by companies that specialize in wetlands restoration.¹²³

In 1993, the EPA and the Corps issued a Memorandum of Agreement stating that, while on-site, in-kind mitigation is preferable, mitigation banks might be an alternative so long as they are created within the same watershed whenever possible.¹²⁴ Proponents point out that pooling of resources in a mit-

termination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990), reprinted in *Envtl. L. Rep. Admin. Materials* (Envtl. L. Inst.) 35,223 (1990)).

¹¹⁷ Liebesman, *supra* note 116, at 17-18.

¹¹⁸ See, e.g., *Pollution from Casinos*, *supra* note 107, at 1A (quoting casino developer as saying, "We're going to give them about 20 (acres) and ask for 2.4. We hope that's a reasonable request.").

¹¹⁹ Tom Charlier, *Casinos Vow to Buy Wetlands*, COM. APPEAL (Memphis), April 13, 1994, at 3B.

¹²⁰ White House Policy Statement, *Protecting America's Wetlands: A Fair, Flexible and Effective Approach* (Aug. 24, 1993). While Clinton has been more supportive of mitigation banks than former President Bush, some commentators have stated that Clinton's ideas on the subject are "hindered by numerous practical flaws," because Clinton would allow the reviewer of the permit application to consider whether a developer planned to participate in a mitigation bank. Lenetsky, *supra* note 26, at 96.

¹²¹ Robert D. Sokolove & P. Robert Thompson, *The Future of Wetland Regulation is Here*, 23 REAL EST. L.J. 78, 81 (1994).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ WANT, *supra* note 14, § 6.10[4], at 6-34.

igation bank allows for input from experts and results in the creation of larger, more ecologically-appropriate projects, rather than the piecemeal efforts of individuals.¹²⁵ Also, "the larger a wetland mitigation bank is, the more likely that it will succeed."¹²⁶ Opponents of mitigation banking might argue that it lessens the value of wetlands by making them commodities for a price: its okay to clear this land because we have mitigation credit. However, the benefits of creating larger, more ecologically-stable wetland areas lessens the severity of opponent criticism.¹²⁷

In fact, when ten Tunica casinos proposed creating a mitigation bank in early 1994, a Mississippi environmental group supported the plan.¹²⁸ The plan, designed to create a 2,300-acre site at the Bolivar-Coahoma County line, would have been the second largest mitigation bank in the South,¹²⁹ and would have served the ecology better than the "scattered parcels" created thus far by casinos.¹³⁰ However, the EPA blocked the proposal in September when the agency revealed that it had problems with the details of that proposal.¹³¹ Despite this setback to the Tunica casinos' plan, it is still foreseeable that mitigation banks will be used in Mississippi in the near future to compensate for casino development.

¹²⁵ Sokolove & Thompson, *supra* note 121, at 81-82. Large mitigation banks are rare in the private sector because of the high costs of such an endeavor. *Id.* at 82. However, several casinos pooling resources might be the perfect method of funding a large mitigation bank. *Id.*

¹²⁶ *Id.* at 81.

¹²⁷ The Bureau of Marine Resources has argued that mitigation is not the solution because manmade wetlands "are almost never as productive as natural ones." Gill Report, *supra* note 4, at 19. Also, creating wetlands areas elsewhere will not make up for the destruction of coastal wetlands. *Id.*

¹²⁸ See Charlier, *supra* note 119, at 3B (stating Mississippi River Coalition viewed mitigation bank proposal "as an important 'first step'").

¹²⁹ *Id.* The largest proposed mitigation bank would be created by Walt Disney World in Florida. *Id.*

¹³⁰ Tom Charlier, *Casino-Developed Wetlands Project Studied as Remedy*, COM. APPEAL (Memphis), Jan. 20, 1994, at 1B.

¹³¹ *Mitigate Miss. Harm*, *supra* note 63, at 1B.

B. Secondary Developments: Building Land-Based Operations Adjacent to Casinos

When a casino developer decides to add a land-based hotel, golf course or other attraction adjacent to his casino, he once again will have to deal with the Corps and/or the Bureau of Marine Resources. This is often because the land, while apparently dry and stable, may still be considered a wetland based on such factors as the saturation of the soil at various times of the year.¹³²

If a permit is required, the developer will undergo the same process he experienced to build the casino, and cumulative impacts will weigh more heavily because of the close proximity to the casino.¹³³ In other words, a very large casino planning to construct an eighteen-hole golf course will have a difficult time getting permitted because the original adjacent structure, the casino, is large and has a greater impact on the environment than a smaller casino, and the proposed land-based activity, the golf course, would occupy a large parcel of land. The Corps might look at whether the secondary development must be situated on a particular piece of land or if it can be located elsewhere. This concept falls under the scope of the practicable alternatives review.¹³⁴ For example, a casino's proposed eighteen-hole golf course might not be permitted to locate

¹³² See *supra* notes 11-19 and accompanying text.

¹³³ Under the Mississippi Coastal Program, the Bureau is required to consider the cumulative effects of other developments in the area. MISSISSIPPI COASTAL PROGRAM, *supra* note 36, at VIII-13.

The Bureau has noted that "[s]upport facilities for casinos, such as restaurants, golf courses, roads and parking garages, built in close proximity to the casinos also contribute to habitat loss and degradation and increase the impacts to the aesthetics of the waterfront." Gill Report, *supra* note 4, at 13.

¹³⁴ 1 GRAD, *supra* note 8, § 3.03[6A][e], at 3-262.51 to .52. For cases discussing the practicable alternatives test, see generally *Sylvester v. United States Army Corps of Eng'rs*, 882 F.2d 407, 408-10 (9th Cir. 1989); *Louisiana Wildlife Fed'n, Inc. v. York*, 603 F. Supp. 518, 527-28 (W.D. La. 1984), *vacated in part and remanded*, 761 F.2d 1044 (5th Cir. 1985); *National Audubon Soc'y v. Hartz Mountain Dev. Corp.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,724, 20,730-31 (D.N.J. 1-983); *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 179-80 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

adjacent to the casino on the shore of the waterway, but an alternative location might be further upland, two miles from the casino, in a less sensitive area.¹³⁵

Some secondary developments in Mississippi have received approval without any great difficulty. Near Robinsonville, a casino developer gained approval in March to extend a four-lane road 1.5 miles, making four casinos more accessible to the anticipated 5,000 cars that will travel along it daily.¹³⁶ The project required filling 2.4 acres of wetlands,¹³⁷ and the casino developer agreed to restore five acres of nearby farmed wetlands. Also, it is foreseeable that more secondary developments will gain approval in the Tunica area if a mitigation bank is eventually created by Tunica casinos.¹³⁸

IV. CONCLUSION

When casinos first arrived in Mississippi in 1992, moral issues seemed to be the opposition's primary impetus. Today, with dozens of gambling barges dotting the state's waterways, environmental groups and state and federal agencies have become more concerned about the cumulative impacts that the casinos will have on the environment. On the Gulf Coast, the Bureau of Marine Resources has taken its plea to the Mississippi Legislature and has battled with casinos over where future developments might locate as approved sites dwindle. In Tunica, the Corps has entertained proposals by casinos to develop mitigation banks to replenish vital wetlands. Above it all, the EPA grapples with whether to step in and freeze casino development in Mississippi and order an Environmental Impact Statement.

Regardless of the EPA's decision, it is clear that future developers will have to shoot straight to gain entry to Mississippi's gaming industry. Permit applications will be more heavily scrutinized and secondary developments will not easily

¹³⁵ See generally WANT, *supra* note 14, § 6.05[2][b], at 6-13 to -14.

¹³⁶ Charlier, *supra* note 107, at 1B.

¹³⁷ *Id.*

¹³⁸ *Mitigate Miss. Harm.*, *supra* note 63, at 1B.

gain approval. Who will dictate the future of Mississippi's gaming industry remains to be seen. The Legislature could circumvent future environmental headaches by removing the water-based restriction from the gaming statute, but this is unlikely and arguably unfair.¹³⁹ In the alternative, Mississippi's gaming future might be impacted by the federal government if the EPA asserts its authority. Either way, it appears that the future of water-based casinos will be determined based on environmental concerns.

ADDENDUM

After this book went to print, the Mississippi Supreme Court decided *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n*, 1995 WL 215939 (Miss.). The court held that the Commission cannot lawfully grant a license which approves construction of a gaming vessel in an artificial inlet. This case should be read in conjunction with the previous article.

¹³⁹ Telephone Interview with Worth Thomas, vice president in charge of government affairs/community relations, Casino Magic (Dec. 16, 1994). Thomas said the state's established casinos have a vested interest in water-based gaming establishments. *Id.* He stated, "Most of the casinos presently in operation would fight any change in the water-based restrictions because you just can't change the rules in the middle of the game." *Id.*

A CASE FOR THE EXERCISE OF FEDERAL COURT JURISDICTION OVER CERTAIN PERSONAL INJURY CLAIMS AGAINST RIVERBOAT CASINOS

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I. INTRODUCTION

The Mississippi Legislature legalized gambling in Mississippi in 1990.¹ The law restricts gambling to "cruise vessels"

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¹ MISS. CODE ANN. § 97-33-1 (1994). The section that allows riverboat and dockside gambling in Mississippi is a revised anti-gambling statute that was passed under Hutchinson's Codes in 1848. The supplemented statute states:

If any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play, or duel, other than a fight or fighting match between dogs, or upon the result of any election, event or contingency whatever, upon conviction thereof, he shall be fined in a sum not more than Five Hundred Dollars (\$500.00); and, unless such fine and costs be immediately paid, shall be imprisoned for any period not more than ninety (90) days. However, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, and

that are located south of Jackson, Harrison and Hancock Counties, the state's three southernmost counties, and vessels that are situated on the Mississippi River or "navigable waters within any county bordering on the Mississippi River"² Because these casinos float on the Mississippi River and in the Gulf of Mexico, the question naturally arises whether Mississippi law or federal law applies to personal injury claims based upon accidents occurring at the casinos.

This article contends that federal law preempts Mississippi law regarding certain personal injuries which may occur at the casinos. The Federal Boat Safety Act³ and regulations promulgated by the Coast Guard and other agencies of the government⁴ have preempted state law both expressly and

in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(c) That is legal under the laws of the State of Mississippi.

Id.

² *Id.* The term "cruise vessel" is defined as "a vessel which complies with all U.S. Coast Guard regulations, having a minimum overall length of one hundred fifty (150) feet and a minimum draft of six (6) feet and which is certified to carry at least two hundred (200) passengers" MISS. CODE ANN. § 27-109-1 (1990). "Vessel" is defined by the Code as "a vessel having a minimum overall length of one hundred fifty (150) feet." *Id.*

³ 46 U.S.C.A. §§ 4301-4311 (West Supp. 1994). The Federal Boat Safety Act provides:

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Id. § 4306.

⁴ These regulations are found generally in the Code of Federal Regulations.

impliedly by "occupying an entire field of regulation and leaving no room for the States to supplement federal law,"⁵ thereby creating a federal question⁶ and allowing certain personal injury lawsuits to be brought in or removed to federal court.⁷ In order to apply the Federal Boat Safety Act and the regulations of federal agencies dealing with vessels, a litigant seeking to bring suit in federal court must show that admiralty law rather than state law applies.⁸ He then must demonstrate

The U.S. District Court for the Middle District of Georgia explained in *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991), that "[t]he [Federal Boat Safety] Act gives the United States Coast Guard the exclusive authority to establish safety regulations for pleasure boats." *Shields*, 776 F. Supp. at 1580 (citations omitted). "The Act requires the Coast Guard to consult with the National Boating Safety Advisory Council ("NBSAC"), a body established by the Act and whose members are appointed by the Secretary [of Transportation]." *Id.* at 1581 (citations omitted).

⁵ *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)), *cert. granted*, 112 S. Ct. 3020 (1992); *cf. Hillsborough County, Fla. v. Automated Med. Labs*, 471 U.S. 707, 713 (1985) (stating that Federal pre-emption of state law can be inferred from overwhelming federal presence); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (noting that dominant federal law precludes enforcement of state law in same area); *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-26 (11th Cir. 1989) (noting three types of pre-emption—express, implied, and occupying field).

⁶ *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016-17 (N.D. Ohio 1991). In *Mowery*, the court held that to allow an Ohio jury to make a factual determination that a propeller guard is required in the design of a motor boat regulated by the FBSA would be tantamount to allowing the State to make regulations in contravention of the preemption clause of the FBSA. *Mowery*, 773 F. Supp. at 1016.

⁷ 28 U.S.C. § 1333(1) (1988). The statute conferring upon the federal courts original and exclusive jurisdiction states that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Id.*

⁸ *Romero v. International Terminal Operating Co.*, 358 U.S. 375, 373-75 (1959). For example, the Court in *Romero* announced:

Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history . . . [A]s is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.

that federal law has indeed preempted state law. This article will first establish that admiralty law applies to certain personal injury actions arising out of accidents at the Mississippi riverboat casinos, and second, that federal regulatory law pertaining to vessels preempts state law as the latter applies to certain personal injury actions.

Admiralty law was created to regulate and monitor maritime commerce of vessels on the high seas.⁹ The threshold admiralty issue is whether the structures on which the casinos are located constitute vessels. The Mississippi Code states that all riverboat casinos must be on "cruise vessels" or "vessels."¹⁰ The Mississippi Legislature chose to incorporate into its riverboat gambling statute its own definitions of "cruise vessel" and "vessel," rather than to rely upon the traditional admiralty or maritime definitions of the terms,¹¹ thereby creating a circular analysis.

The definition of "vessel," as codified in the United States Code and interpreted by the federal courts, is broad enough to include structures that float, even though such structures have no motive power themselves.¹² Many of Mississippi's

Id. at 374-75. The federal law becomes focal and "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Id.* at 373.

⁹ *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454 (1851).

¹⁰ MISS. CODE ANN. § 27-109-1(2) (1990); *see supra* notes 2-3 and accompanying text.

¹¹ MISS. CODE ANN. § 27-109-1 (1990). For traditional admiralty and maritime definitions of "vessel," *see* 46 U.S.C.A. app. § 801 (West 1994). Vessel is defined as "all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water." *Id.*

¹² "Vessel" is defined in the United States Code as "every description of watercraft or other artificial contrivance used, or *capable of being used*, as a means of transportation on water". 1 U.S.C.A. § 3 (West 1985) (emphasis added); *see also* 46 U.S.C.A. app. § 801 (West 1994) (defining vessel as "all watercraft and other artificial contrivances . . . which are used or are capable of being . . . used as a means of transportation on water"). For various opinions discussing the definition of vessel, *see* *Miami River Boat Yard, Inc. v. 60-Foot Houseboat*, 390 F.2d 596, 597 (5th Cir. 1968) (holding that houseboat with no motive power, but still

riverboat casinos fit such a description. One possible explanation for the unique design of Mississippi casinos is the Mississippi Supreme Court's liberal approach in considering whether a structure is a vessel. In *Texaco, Inc. v. Addison*,¹³ the court adopted Louisiana's definition of the term, which provides that "every description of watercraft or other contrivance used or capable of being used as a means of transportation on water" is a vessel.¹⁴

Applying this definition to Mississippi's various casinos, those casinos which are equipped for self-propulsion and have a crew may legitimately be considered "vessels" even though they are docked and rarely sail.¹⁵ However, other casinos that

capable of being used in navigation was vessel under terms of FMLA regulations); *M/V Marifax v. McCrory*, 391 F.2d 909, 910 (5th Cir. 1968) (stating "vessel" was such so long as it was capable of being used in navigation); *In re Queen Ltd.*, 361 F. Supp. 1009, 1013 (E.D. Pa. 1973) (concluding that permanence of structure's attachment to land was important in determining structure's vessel status); *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930) (rejecting intended use of structure as dispositive of vessel status); *The Ark*, 17 F.2d 446, 447-48 (S.D. Fla. 1926) (stating that structure analogous to "ship temporarily withdrawn from commerce" was vessel for purposes of admiralty jurisdiction).

¹³ 613 So. 2d 1193 (Miss. 1993).

¹⁴ *Addison*, 613 So. 2d at 1200. In *Addison*, the court had to make a determination of whether a craft was a "vessel" so as to come under the Jones Act. *Id.* The court noted that the Jones Act does not define a "vessel," but the court adopted the maritime law "capability test" used in *Oregon v. Avondale Shipyards, Inc.*, 561 So. 2d 38, 41 (La.), *cert. denied*, 498 U.S. 818 (1990).

¹⁵ *Addison*, 613 So. 2d at 1200. The court in *Pavone v. Mississippi Riverboat Amusement Corp.*, No. Civ.A. 93-3354, 1994 WL 97820 (E.D. La. Mar. 21, 1994), stated:

[T]o recover damages from an employer under the Jones Act, the plaintiff must be a "seaman," . . . who has demonstrated that he was permanently assigned to, or performed a substantial part of his work aboard a "vessel," [sic] and that the work he performed contributed to the function of the vessel or the accomplishment of its mission.

Pavone, 1994 WL 97820, at *1. Although the court held as a matter of law that the Biloxi Belle was not a "vessel" so as to bring the plaintiff under the protective arms of the Jones Act, the court did not find that the Biloxi Belle was not a "vessel" with regard to all maritime jurisdiction. *Id.* at *2. *But cf.* *Charles N. White Constr. Co. v. MRA, Ltd. (In re Biloxi Casino Belle, Inc.)*, No. 94-08534SEG (Bankr. S.D. Miss. Jan. 10, 1995) (concluding that Biloxi Belle II casino and Southern Belle casino were "not 'vessels' for purposes of federal admiralty and maritime matters and the Ship Mortgage Act"); *Ketzel v. Mississippi Riverboat Amusement*,

are not capable of self-propulsion present more of a conceptual problem since they float and are capable of being towed. Regardless, it has been established that the capacity for self-propulsion is not dispositive of vessel status.¹⁶ Therefore, under Mississippi and federal law alike, Mississippi's riverboat casinos apparently will satisfy the definitions of "vessels."¹⁷ Accordingly, no further discussion as to what constitutes a "vessel" will be contained in this article. For the purpose of this article, the reader should assume that the Mississippi riverboat casinos are "vessels."

II. THE CRITERIA FOR ADMIRALTY JURISDICTION

To invoke federal jurisdiction under the Federal Boat Safety Act or the several federal regulations concerning vessel safety, a litigant must first show that the claim meets the requirements for admiralty jurisdiction. The analysis as to whether a suit falls within the purview of admiralty jurisdiction has evolved from a simple one-part test into a multi-factor test which varies from circuit to circuit. The initial test for admiralty jurisdiction focused on whether the activity complained of happened on tidewater.¹⁸ That initial test was

Ltd., 867 F. Supp. 1260, 1267-68 (S.D. Miss. 1994) (holding as matter of law that Biloxi Belle was not vessel for Jones Act purposes).

¹⁶ See *Miami River Boat Yard, Inc.*, 390 F.2d at 597 (holding that lack of motive capabilities does not, in and of itself, preclude structure from attaining vessel status); *M/V Marifax*, 391 F.2d at 910 (holding that contrivance was "vessel" as long as it was capable of being used in navigation); *The Club Royale*, 13 F. Supp. 123, 125-26 (D.N.J. 1935) (ruling that ship temporarily moored serving as dance hall and restaurant was "vessel" even though its propulsion devices had been removed).

¹⁷ But see *King v. President Riverboat Casino-Miss., Inc.*, No. 1:94CV233GR (S.D. Miss. Mar. 10, 1995) (finding casino was "not a vessel and that the activity associated with [the plaintiffs] injury was not sufficiently connected to any traditional maritime activity to invoke the Court's jurisdiction over admiralty and maritime matters."); *supra* note 15. Whether a riverboat casino is a vessel is the threshold inquiry into admiralty jurisdiction. For a complete discussion of what constitutes a vessel, see Stephen E. Psarellis et al., *Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling*, 6 U.S.F. MAR. L.J. 49 (1993), and Brian D. Wallace, *Admiralty Jurisdiction Over Riverboat Gaming: A Defense Perspective* (Aug. 4-9, 1994) (unpublished manuscript of presentation given at American Bar Association Convention on file with ABA).

¹⁸ *Waring v. Clarke*, 46 U.S. (5 How.) 441, 454 (1847). The cause of action in

then followed by the "locality" test,¹⁹ and the *Executive Jet* two-prong test.²⁰

In *Sisson v. Ruby*,²¹ however, the United States Supreme Court stated its most recent and revised test for admiralty

Waring arose out of a collision that took place within the ebb and flow of the tide 95 miles north of New Orleans on the Mississippi River. *Waring*, 46 U.S. (5 How.) at 451. The Court, grappling with the question of admiralty jurisdiction, opined "that in cases purely dependent upon the locality of the act done, . . . [admiralty jurisdiction] is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high-water mark." *Id.* at 464 (emphasis added).

¹⁹ *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). Chief Justice Taney, writing for the Court, specifically found in regard to the "tidewater test":

There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on account, it is merely arbitrary, without any foundation in reason. . . .

The Propeller Genesee Chief, 53 U.S. (12 How.) at 454.

²⁰ *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 251 (1972). Although the "locality test," announced in 1851, conferred admiralty jurisdiction over every tort that took place on navigable waters, it did not take into consideration the expanding nature of the transportation industry. In *Executive Jet*, the Court revisited the requisite findings necessary to invoke admiralty jurisdiction. The facts surrounding the decision in *Executive Jet* involved an aircraft owned by Executive Jet Aviation which collided with a flock of sea gulls as it was departing from Burke Lakefront Airport. *Executive Jet*, 409 U.S. at 250. As a result of striking the flock of sea gulls the aircraft sank "in the navigable waters of Lake Erie." *Id.* Clearly, this action would comply with the "locality test" and confer admiralty jurisdiction. The Court reasoned that "[o]ne area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation." *Id.* at 261. "[W]e have concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases." *Id.* The Court, recognizing that the locality test was insufficient, concluded that a party must demonstrate that the "alleged wrong 'occurs' or 'is located' on or over navigable waters" and must further show that "the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268. The Court's decision in *Executive Jet* marked the beginning of a continuing departure from a strict locality test for determining whether a certain incident fell within admiralty jurisdiction.

²¹ 497 U.S. 358 (1990).

jurisdiction.²² In *Sisson*, the cause of action arose when Sisson's pleasure yacht caught fire while docked in a marina on Lake Michigan.²³ The Court assumed that the marina was navigable water,²⁴ and, after a discussion of the history of admiralty jurisdiction,²⁵ analyzed the case under new factors.²⁶ The factors the *Sisson* Court applied were: (1) whether the wrong occurred in navigable water; (2) whether there is a "substantial relationship" between the activity bringing about the loss and traditional maritime activity; and (3) whether the general features of the type of incident have a potentially disruptive effect on maritime commerce.²⁷ The Supreme Court and all lower federal courts currently follow the test announced in *Sisson*.²⁸

A. Navigable Water

The first prong of the *Sisson* test for admiralty jurisdiction, whether the wrong occurred in navigable water, incorporates the locality test first discussed in the 1885 case of *The Propeller Genesee Chief v. Fitzhugh*.²⁹ The Supreme Court in *The Propeller Genesee Chief* held that admiralty jurisdiction would be invoked if the action accrued on a vessel on navigable waters.³⁰

²² *Sisson*, 497 U.S. at 363-67.

²³ *Id.* at 360.

²⁴ *Id.*

²⁵ *See id.* at 360-61.

Until recently, § 1331(1) jurisdiction over tort actions was determined largely by the application of a "locality" test. As this Court stated the test in *The Plymouth*, 3 Wall. 20, 36 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

Id.

²⁶ *Sisson*, 497 U.S. at 363-67.

²⁷ *Id.*

²⁸ *See Three Buoys Houseboat Vacation U.S.A., Ltd. v. Morts*, 497 U.S. 1020, 1020 (1990), *cert. denied*, 502 U.S. 898 (1991); *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228-29 (7th Cir. 1993); *Penton v. Pompano Constr. Co.*, 976 F.2d 636, 640-42 (11th Cir. 1992).

²⁹ 53 U.S. (12 How.) 443 (1851).

³⁰ *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 457. *The Propeller Gene-*

Under Mississippi law the riverboat casinos must be located on "navigable waters," as defined in the Mississippi Code,³¹ or in the waters south of the three southernmost counties of the state.³² Regardless of how the Mississippi Code defines "navigable waters," though, the federal courts' interpretation of "navigable waters" must be analyzed to determine if admiralty jurisdiction is employed in personal injury cases against Mississippi riverboat casinos.

The United States Supreme Court generally has been liberal in its interpretation of navigable waters. In a lengthy discussion, the Court in *The Propeller Genesee Chief* ruled that Lake Ontario, as a whole, was a navigable waterway.³³ Over one hundred years later, the Court simply stated, with no discussion, that a remote marina on Lake Michigan satisfied the test.³⁴ In other cases, the Court similarly ruled that the Susquehanna River at Havre de Grace, Maryland,³⁵ the

see Chief was a progression from the "tidewater" test as stated in *Waring v. Clarke*, 46 U.S. (5 How.) 441, 464 (1847). *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 456-57. In *The Propeller Genesee Chief*, the Court stated that jurisdiction "depend[ed] upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution." *Id.* at 457.

³¹ MISS. CODE ANN. § 27-109-1(2) (1990), defines navigable waters as:

[A]ny rivers, creeks, bayous or other bodies of water within any county in this state bordering on the Mississippi River that are used or susceptible of being used as an artery of commerce and which either in their natural or improved condition are used or suitable for use as an artery of commerce or are used for the docking or mooring of a vessel, notwithstanding interruptions between the navigable parts of such rivers, creeks, bayous or other bodies of water by falls, shallows, or rapids compelling land carriage.

Id.

³² See *supra* note 1 and accompanying text.

³³ *The Propeller Genesee Chief*, 53 U.S. (11 How.) at 453. The Court in *The Propeller Genesee Chief* further noted that "[w]e have thousands of miles of public navigable water, including lakes and rivers in which there is no tide." *Id.* at 457.

³⁴ *Sisson v. Ruby*, 497 U.S. 358, 360 (1990). "[W]hile the *Ultorian* was docked at a marina on Lake Michigan, a navigable waterway, a fire erupted in the area of the vessel's washer/dryer unit." *Id.*

³⁵ *Philadelphia, W. & B.R.R. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 219 (1859). The Court noted:

Amite River in Louisiana³⁶ and the Illinois and Michigan canal³⁷ constituted navigable waters.

Other federal courts, the Fifth Circuit in particular, have applied an equally liberal interpretation of "navigable waters." As stated in *Sanders v. Placid Oil Co.*,³⁸ waters are navigable "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary

It is contended that the "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed with force on the sea and *navigable waters*, such as collision of vessels, assaults, etc., and that the placing and leaving the plies in the bed of the river, and within the body of a county, is a nuisance at common law, and the remedy of the appellees should have been by an action on the case.

Philadelphia, W. & B.R.R., 64 U.S. (23 How.) at 215 (emphasis added).

³⁶ *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676-77 (1982). Although the Court did not directly address the issue of the navigability of the Amite River, it explained:

The District Court assumed that the Amite River is navigable at the site of the collision. Although the issue is not free from doubt, it appears from the opinion and the disposition of the Court of Appeals that the court found that the river is navigable at this site although seldom, if ever, used for commercial traffic.

Foremost Ins. Co., 457 U.S. at 670 n.2.

³⁷ *Ex Parte Boyer*, 109 U.S. 629, 631 (1884). In an in-depth discussion of the Illinois and Michigan canal, the Court explained:

Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State.

Ex Parte Boyer, 109 U.S. at 632. For further United States Supreme Court cases discussing navigable waters during this time period, see *The Montello*, 87 U.S. (Wall.) 430, 439-44 (1874); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-64 (1871); *The Eagle*, 75 U.S. (8 Wall.) 15, 20-26 (1868); *The Belfast*, 74 U.S. (7 Wall.) 624, 632-42 (1868); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451-57 (1851).

³⁸ 861 F.2d 1374 (5th Cir. 1988).

modes of trade and travel on water."³⁹ It matters not whether the waters are natural or man-made.⁴⁰ For example, in *Kelly v. Smith*,⁴¹ the Fifth Circuit ruled that an inlet of the Mississippi River which housed an island and a hunting camp was navigable water.⁴² Lakes that are contained in one state likewise have been held to be navigable waters by the Fifth Circuit.⁴³

Some commentators contend that the issue of what constitutes navigable waters will gain importance due to the emergence of riverboat casinos.⁴⁴ As explained by a Louisiana federal district court, "[T]he Court is hard-pressed to find a definition of 'navigable in fact' for purposes of admiralty jurisdiction."⁴⁵ Just as important, however, are decisions regarding what constitutes a traditional maritime activity in order to satisfy the "nexus requirement" for admiralty jurisdiction.

B. The "Nexus Requirement"

The second prong of the *Sisson* test is known as the "nexus requirement."⁴⁶ This prong, initially explained in *Executive Jet Aviation, Inc. v. City of Cleveland*,⁴⁷ states "that the wrong [must] bear a significant relationship to traditional

³⁹ *Sanders*, 861 F.2d at 1377 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871)).

⁴⁰ *Id.* "[N]avigable waters of the United States are those waters capable, in fact, of navigation in interstate travel or commerce, and *distinctions between natural and man-made bodies of water are immaterial.*" *Id.* (emphasis added); see also *Wilder v. Placid Oil Co.*, 611 F. Supp. 841, 845 (D.C. La. 1985) ("Navigable water' subject to admiralty jurisdiction is defined as including waters that are navigable in fact. This includes man-made or artificial bodies of water." (citations omitted)), *aff'd sub nom.* *Sanders v. Placid Oil Co.*, 861 F.2d 1374 (5th Cir. 1988).

⁴¹ 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

⁴² *Kelly*, 485 F.2d at 525. The district court ruled that "the Mississippi River where the Kellys were injured was navigable." *Id.* The Fifth Circuit did not overturn this ruling. *Id.*

⁴³ *Wilder*, 611 F. Supp. at 845-46 (discussing navigable waters affect on commerce).

⁴⁴ See Psarellis et al., *supra* note 17, at 61-69 (discussing definition of vessel).

⁴⁵ *Wilder*, 611 F. Supp. at 845.

⁴⁶ *Sisson v. Ruby*, 497 U.S. 358, 365 (1990).

⁴⁷ 409 U.S. 249 (1972).

maritime activity" in order to invoke admiralty jurisdiction.⁴⁸ In *Sisson*, the court concluded that the nexus arose through the owner's negligent operation of a vessel by allowing a fire to start on his docked boat.⁴⁹ The nexus occurs not only through navigation but through any "activities traditionally undertaken by vessels, commercial or noncommercial."⁵⁰ For example, the storage and maintenance of a vessel at a marina,⁵¹ negligent operation of a recreational vessel,⁵² negligent operation of a hoist while a worker on a vessel unloaded cargo,⁵³ offshore oil drilling⁵⁴ and rifle fire from land directed at

⁴⁸ *Executive Jet Aviation, Inc.*, 409 U.S. at 268.

⁴⁹ *Sisson*, 497 U.S. at 363. In a concurring opinion, Justice Scalia stated that "[b]ecause the 'wrong' here . . . involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court." *Id.* at 370 (Scalia, J., concurring) (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)).

⁵⁰ *Sisson*, 497 U.S. at 367.

⁵¹ See *id.* The *Sisson* Court ruled that "the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity' given the broad perspective demanded by the second aspect of the test." *Id.*

⁵² See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). An action was brought in federal district court for wrongful death arising out of a collision between "pleasure boats." *Foremost Ins. Co.*, 457 U.S. at 669. The complaint asserted that the district court had admiralty jurisdiction. *Id.* at 670. The district court dismissed the complaint holding "that there must be some relationship with traditional maritime activity for an injury sustained on navigable water to fall within federal admiralty jurisdiction." *Id.* at 671. The district court further held "that commercial maritime activity [not present here] is necessary to satisfy this relationship." *Id.* The case was appealed to the United States Supreme Court, and Justice Marshall, delivering the opinion of the Court, held:

[i]n light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, . . . a complaint alleging a collision between two vessels, including pleasure boats, on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts.

Id. at 677.

⁵³ See *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 649 (1935) (holding that incident where longshoreman, who was working on docked vessel, was struck by hoist and thrown upon dock satisfied nexus test).

⁵⁴ See *Broughton Offshore Drilling, Inc. v. South Cent. Mach., Inc.*, 911 F.2d

a vessel⁵⁵ have all created the nexus required for admiralty jurisdiction. The nexus, however, has not been found in cases dealing with an airplane crashing into Lake Erie,⁵⁶ a longshoreman negligently operating a hoist and injuring a worker on land,⁵⁷ a swimmer at a public beach,⁵⁸ wrongful-death actions under certain provisions of the Death on the High Seas Act⁵⁹ and other situations.⁶⁰

1050, 1053 (5th Cir. 1990). This action arose between a land-based business and an offshore drilling operation. *Broughton Offshore Drilling, Inc.*, 911 F.2d at 1052. The land-based business undertook to do certain repairs on hydraulic rods. *Id.* at 1051. The rods failed, and a blowout occurred necessitating underwater salvage operations. *Id.* The Fifth Circuit found that since the tort involved underwater operations, "the damaged suffered by the drilling barge and its buoyancy mat are sufficiently related to traditional admiralty concerns to bring this case within the admiralty jurisdiction." *Id.* at 1053.

⁵⁵ See *Kelly v. Smith*, 485 F.2d 520, 526 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974). The Fifth Circuit held in *Kelly* that "[r]ifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct." *Kelly*, 485 F.2d at 526.

⁵⁶ See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 272 (1972) ("We can find no significant relationship between such an event befalling a land-based plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters.").

⁵⁷ See *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179, 182 (1928) (holding that because worker was on land, accident in question was not maritime tort).

⁵⁸ See *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 965-66 (6th Cir. 1967). In *Chapman*, where the appellant dove off the side of a pier into 18 inches of water, the district court dismissed the action stating that it could not be maintained under admiralty jurisdiction because the alleged wrong did not bear a significant relationship to traditional maritime activity. *Chapman*, 385 F.2d at 963. The Sixth Circuit affirmed, holding:

A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.

Id. at 966. The court went on to conclude that the action did not fall within admiralty jurisdiction. *Id.*; see Charles L. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950) (discussing scope of maritime jurisdiction).

⁵⁹ See *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352, 365-66 (1969). In

The Fifth Circuit Court of Appeals has long since analyzed admiralty jurisdiction using criteria similar to those set forth in the *Sisson* test.⁶¹ However, the Fifth Circuit broke the nexus requirement down into four distinct factors: "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law."⁶² The United States Supreme Court has not expressed its approval or disapproval of this approach.⁶³ Nevertheless, the

Rodrigue, the Court stated:

[F]or federal law to oust adopted state law federal law must first apply. The Court below assumed that the Seas Act did apply, since the island was located more than a marine league off the Louisiana coast. But that is not enough to make the Seas Act applicable. The Act redresses only those deaths stemming from wrongful actions or omissions "occurring on the high seas," and these cases involve a series of events on artificial islands. Moreover, the islands were not erected primarily as navigational aids, and the accident here bore no relation to any such function.

Rodrigue, 395 U.S. at 359-60 (footnotes omitted).

⁶⁰ The following is a list of cases which hold that admiralty jurisdiction was not proper where although the torts satisfied the locality portion of the jurisdictional test, the torts did not have a significant relationship to maritime activity: *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972); *Gowdy v. United States*, 412 F.2d 525, 527-29 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969); *J.W. Petersen Coal & Oil Co. v. United States*, 323 F. Supp. 1198, 1201 (N.D. Ill. 1970); *O'Connor & Co. v. City of Pascagoula*, 304 F. Supp. 681, 683 (S.D. Miss. 1969); *Smith v. Guerrant*, 290 F. Supp. 111, 113-15 (S.D. Tex. 1968); *Hastings v. Mann*, 226 F. Supp. 962, 964-65 (E.D.N.C. 1964), *aff'd*, 340 F.2d 910 (4th Cir.), *cert. denied*, 380 U.S. 963 (1965).

⁶¹ See *Kelly v. Smith*, 485 F.2d 520, 524-25 (5th Cir. 1973) (discussing Fifth Circuit's substantial connection requirement), *cert. denied*, 416 U.S. 969 (1974).

⁶² *Kelly*, 485 F.2d at 525.

⁶³ The Supreme Court recognized the *Kelly* test as one approach to judging maritime nexus in *Sisson v. Ruby*, 497 U.S. 358, 365 n.4 (1990). "However, the Court neither approved nor disapproved of the *Kelly* approach. In the absence of further guidance from the Court, we will continue to follow the *Kelly* approach and our cases applying it." *Broughton Offshore Drilling, Inc. v. South Cent. Mach., Inc.*, 911 F.2d 1050, 1052 n.1 (5th Cir. 1990). The *Sisson* Court took specific note of the four factor significant relationship test developed in *Kelly*. *Sisson*, 497 U.S. at 365 n.4; *cf. Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1051 (11th Cir. 1989) (discussing *Kelly* test); *Guidry v. Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987) (discussing significant relationship requirement); *Drake v. Raymark Indus., Inc.*, 772 F.2d 1007, 1015-16 (1st Cir. 1985) (discussing which circuits have adopted *Kelly* test).

Fifth Circuit continues to follow it.⁶⁴

The analysis of the nexus between the wrong and the traditional maritime activity is very fact-intensive. In determining whether a personal injury claim by a patron of a riverboat casino satisfies this nexus, courts must scrutinize particular facts on a case by case basis. Prior decisions by federal courts indicate greater willingness to find the requisite nexus when the tort occurs on the vessel itself.⁶⁵ When the personal injury occurs in the parking lot, in a restaurant located on property owned by the casino, or in other structures on the casino's land, the nexus will be harder to demonstrate. Without a showing of the nexus, the claim will not be subject to admiralty jurisdiction.

C. Potential Disruption of Maritime Commerce

The third prong of the *Sisson* test to determine the applicability of admiralty jurisdiction is whether the general features of the incident giving rise to the claim have "a potentially disruptive impact on maritime commerce"⁶⁶ This factor was apparently added because "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce"⁶⁷ Because the test states that there must only be a "potential" disruption to maritime commerce, the *actual* consequences or effects of an incident are irrelevant.⁶⁸

⁶⁴ See *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885-86 (5th Cir. 1993) (discussing *Kelly* factors with *Sisson* test), *cert. denied*, 114 S. Ct. 1303 (1994).

⁶⁵ See *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 648-49 (1935) (holding that negligent operation of hoist while worker was on vessel unloading cargo satisfied requirements for admiralty jurisdiction). *But cf.* *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179, 182 (1928) (holding that claim of worker injured on docked vessel was not subject to maritime law).

⁶⁶ *Sisson v. Ruby*, 497 U.S. 358, 362 (1990).

⁶⁷ *Coats*, 5 F.3d at 885 (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)); see also *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (stating that to determine scope of admiralty jurisdiction, one must look to its purpose).

⁶⁸ John S. Hunter, *Admiralty Jurisdiction Over Riverboat Gambling: A Plaintiff's Perspective* 2 (Aug. 4-9, 1994) (unpublished manuscript of presentation

The *Sisson* Court required that the party seeking to invoke maritime jurisdiction must demonstrate that the activity giving rise to the incident had a potentially disruptive effect on maritime commerce.⁶⁹ This requirement has been recognized as one that does not demand that the activity giving rise to the injury actually have a demonstrable impact on maritime commerce, but only that the activity involved be of a type that has a potential impact on maritime commerce.⁷⁰ The Court's distinction between actual and potential disruption is an instruction to examine the *potential* impact of an accident, rather than the *actual* effects that transpired.

This interpretation was sufficiently expansive to allow the Fifth Circuit in *Palmer v. Fayard Moving & Transportation Corp.*,⁷¹ to exercise admiralty jurisdiction over a slip and fall accident. The court noted that other courts have consistently found shipboard slip and fall injuries to be within the definition of a maritime tort.⁷² Similarly, in *Everett v. Carnival Cruise Lines*,⁷³ the Eleventh Circuit Court of Appeals found that a passenger who tripped over a protrusion in a doorway suffered a maritime tort and applied admiralty law to the evidence presented.⁷⁴ The courts in both of these post-*Sisson* cases exercised jurisdiction over slip and fall type accidents by characterizing the accidents as maritime torts.⁷⁵ From this discussion, it is apparent that personal injuries occurring on Mississippi riverboat casinos constitute maritime torts that should fall within the purview of admiralty jurisdiction.

given at American Bar Association Convention, on file with ABA).

⁶⁹ *Sisson*, 497 U.S. at 363.

⁷⁰ *In re Bird*, 794 F. Supp. 575, 580 (D.S.C. 1992).

⁷¹ 930 F.2d 437 (5th Cir. 1991).

⁷² *Palmer*, 930 F.2d at 441; see *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 n.4 (1st Cir. 1988) (ruling that slip-and-fall injury on cruise liner was subject to admiralty jurisdiction); *Taylor v. Kennedy Engine, Inc.*, 861 F.2d 127, 131 (5th Cir. 1988) (holding that injury resulting from slip-and-fall on vessel's deck was subject to maritime law); *Smith v. Southern Gulf Marine Co.*, 791 F.2d 416, 419 (5th Cir. 1986) (holding that slip-and-fall injury was subject to maritime law).

⁷³ 912 F.2d 1355 (11th Cir. 1990).

⁷⁴ *Everett*, 912 F.2d at 1358. The threshold over which the passenger tripped was not even an inch high. *Id.* at 1357.

⁷⁵ *Id.* at 1358.

Once the *Sisson* three part test is satisfied, admiralty jurisdiction will be applied. However, because state courts themselves may apply admiralty jurisdiction, the underlying cause of action will not necessarily be removable to federal court.⁷⁶ Removal to federal court under the idea that admiralty cases present a federal question is incorrect.⁷⁷ Article Three, Section Two of the United States Constitution grants to the federal courts judicial power over maritime claims by providing that "[t]he Judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."⁷⁸ Nevertheless, a case brought in personam in admiralty is "cognizable in the courts of . . . [Mississippi] . . . under the 'Savings-to-Suitors' clause of the Federal Judicial Code."⁷⁹ Therefore, to obtain federal jurisdiction over personal injury claims against riverboat casinos, it must be shown that a federal law (or laws) have completely preempted state law in that field.

III. PREEMPTION OF STATE STATUTORY, REGULATORY AND COMMON LAW

The Supremacy Clause of the United States Constitution allows for federal preemption of state law.⁸⁰ Courts apply the preemption doctrine "to effectuate a congressional occupation of a particular field, even where there are gaps in the federal regulatory scheme, or to nullify state regulation in conflict

⁷⁶ See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 362 (1959) (noting state courts' traditional authority regarding maritime matters).

⁷⁷ See *infra* notes 78-79 and accompanying text.

⁷⁸ U.S. CONST. art. III, § 2.

⁷⁹ *Burgess v. Halter Marine, Inc.*, 445 So. 2d 1385, 1387 (Miss. 1984).

⁸⁰ The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2. See generally, William W. Bratton, Jr., *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623 (1975) (discussing application of preemption doctrine).

with federal legislation.”⁸¹ Congress must intend to preempt state law for preemption to occur.⁸² As explained in *Cipollone v. Liggett Group, Inc.*,⁸³ “Congress’ intent may be ‘explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’”⁸⁴ “In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁸⁵

Where one can show that preemption of a state law or common law scheme has occurred, a federal question has arisen and a claim falling within the field may be removed to federal court.⁸⁶ In the field of personal injury claims against riverboat casinos, Mississippi common law and statutory law defining reasonable and safe premises is preempted by federal law. State law is preempted by the Federal Boat Safety Act and the regulations promulgated pursuant thereto by the Secretary of Transportation and the Coast Guard. However, before it can be shown that these federal laws preempt Mississippi law, a full analysis of express and implied preemption is necessary.

⁸¹ Bratton, *supra* note 80, at 624.

⁸² Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

⁸³ 112 S. Ct. 2608 (1992).

⁸⁴ *Cipollone*, 112 S. Ct. at 2617 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

⁸⁵ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (citations omitted).

⁸⁶ See, e.g., *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581-82 (M.D. Ga. 1991) (holding that plaintiff’s state law products liability claim arising from injuries sustained from ostensibly unreasonably dangerous boat propeller was expressly preempted by Federal Boat Safety Act).

A. Express Preemption

Congress may expressly state its intention for a federal law or regulation to preempt state law.⁸⁷ A federal court's goal, therefore, is "to prevent subtle or incremental encroachment into a field Congress has chosen expressly to reserve for federal law."⁸⁸ Congress routinely passes laws governing areas that it expressly desires to regulate.⁸⁹

In interpreting the express preemption clause of a federal law, "courts employ two techniques: the analytical or plain-meaning method, acting on the literal meaning of the words in the statute, and the teleological method, acting on the intend-

⁸⁷ In *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989), the wife of a smoker brought a products liability case against a cigarette manufacturer after her husband died of cancer of the esophagus. *Pennington*, 876 F.2d at 416. She alleged that the tobacco companies failed to provide adequate labeling regarding the dangers of cigarette smoking, and that cigarettes are unreasonably dangerous under Louisiana law. *Id.* at 416-17. The court looked at the preemption clause found in the Federal Cigarette Labeling and Advertising Act. *Id.* The court recognized that Congress intended for there to be one national law regulating cigarette labeling and found that some of the plaintiff's claims were barred. *Id.* However, the court found that Pennington's "contention that the tobacco companies failed to provide adequate warnings before the effective date of the Act and her claim that cigarettes are unreasonably dangerous per se under Louisiana law . . . [were] not preempted." *Id.* at 427.

⁸⁸ George L. Flint, Jr., *ERISA: Nonwaivability of Preemption*, 39 KAN. L. REV. 297, 303 (1991). Flint discusses preemption in the specific context of the Employment Income Retirement Act of 1974 (ERISA), which contains an express preemption clause relegating the authority of similar state laws to that of Federal law as codified in ERISA. *Id.* at 297. A good example of the preemption issue as faced by courts is found in *Anderson v. Electronic Data Sys. Corp.*, 11 F.3d 1311 (5th Cir.), *cert. denied*, 115 S. Ct. 55 (1994), in which a former employee brought a wrongful discharge action against her employer. *Anderson*, 11 F.3d at 1312. Anderson was discharged for failure to make certain reports regarding the employer's pension plan. *Id.* In making its determinations, the Fifth Circuit relied on the Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). The Court in *McClendon* stated that ERISA's preemption clause was "deliberately expansive" and constructed to maintain the federal government's purview over pension plans. *McClendon*, 498 U.S. at 138. The Court then found that ERISA preempted the plaintiff's state law wrongful discharge claim, both expressly and impliedly, in that the existence of a pension plan was a necessary element of the plaintiff's prima facie case. *Id.* at 139-40.

⁸⁹ See *supra* note 88 and accompanying text.

ed legislative remedy."⁹⁰ When applying the analytical approach, courts will use the statute itself and intrinsic aids typically used in contract interpretation.⁹¹ The teleological method causes courts to rely more upon the intent of the drafters of the preemption portion of the law.⁹² Courts use external aids to apply the teleological method. Those aids, which include legislative history, other statutes, prior judicial decisions and historical context,⁹³ allow the court to "examine[] the problem that the legislature set out to solve and the remedy it developed and then construe[] the statute in light of achieving those ends."⁹⁴ The United States Supreme Court has followed both approaches.⁹⁵

B. Implied Preemption

Implied preemption has the same effect as express preemption.⁹⁶ It "applies whether the federal law is embodied in a statute or a regulation, and whether the state law is rooted in a statute, regulation, or common law rule."⁹⁷ Implied preemption occurs:

- (1) "when there is outright or actual conflict between federal and state law;"

⁹⁰ Flint, *supra* note 88, at 326.

⁹¹ *Id.* One way to explain this method is that this is not necessarily what the drafters meant to say, but rather what they actually said. *Id.* at 327.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 327-28.

⁹⁵ Flint, *supra* note 88, at 327-28.

⁹⁶ Bratton, *supra* note 80, at 622-24 (noting that effect of every type of preemption is to preclude enforcement of state law and define breadth of federal power).

⁹⁷ Taylor v. General Motors Corp., 875 F.2d 816, 826 (11th Cir. 1989) (citations omitted) (holding federal regulations, as well as laws, can preempt state laws and local ordinances of municipalities within states), *cert. denied*, 494 U.S. 1065 (1990); see Hillsborough County, Fla. v. Automated Med. Labs., 471 U.S. 707, 713 (1985) (noting areas of law traditionally left to states can be preempted if they actually conflict with federal law); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186-87 (3d Cir. 1986) (same), *cert. denied*, 479 U.S. 1043 (1987); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (following Cipollone).

- (2) "where compliance with both federal and state law is in effect physically impossible;"
- (3) "where there is implicit in federal law a barrier to state regulation;"
- (4) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or
- (5) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."⁹⁸

The key determinant of implied preemption is "whether Congress intended that federal regulation supersede state law."⁹⁹ In *Rice v. Santa Fe Elevator Corp.*,¹⁰⁰ Justice Douglas reiterated several factors for establishing the intent of Congress to pass a law that will preempt state law:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.¹⁰¹

Implied preemption will occur when there is actual conflict between federal and state law. For example, in *Free v. Bland*,¹⁰² the Supreme Court examined a Texas law which provided that U.S. savings bonds bought with marital funds constituted community property, and which compelled a husband to reimburse his wife's estate upon acquiring such a bond.¹⁰³ That state law directly conflicted with treasury regu-

⁹⁸ *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (citations omitted)), *cert. denied*, 114 S. Ct. 300 (1993).

⁹⁹ *Papas*, 926 F.2d at 1022 (quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369).

¹⁰⁰ 331 U.S. 218 (1947).

¹⁰¹ *Rice*, 331 U.S. at 230 (citations omitted).

¹⁰² 369 U.S. 663 (1962).

¹⁰³ *Free*, 369 U.S. at 670.

lations that conferred a right of survivorship to the husband.¹⁰⁴ The Court held that the purpose of the treasury regulations was to "establish the right of survivorship regardless of local state law."¹⁰⁵ Because of the conflict, the Court held that "the survivorship provision is a federal law which must prevail if it conflicts with state law."¹⁰⁶ The Court reasoned that savings bonds have a tremendous impact on the treasury, and that states may not interfere with or frustrate an individual's attempt to rely on the federal surviving spouseship provision.¹⁰⁷ The law requiring the survivor to reimburse the deceased estate "interfered directly with a legitimate exercise of the power of the Federal Government to borrow money."¹⁰⁸ Therefore, the Supremacy Clause allowed the federal regulations found in the Code of Federal Regulations to preempt the conflicting state law.¹⁰⁹

Federal preemption may also occur when compliance with both federal and state law is a physical impossibility. This was the case in *Florida Lime & Avocado Growers, Inc. v. Paul*.¹¹⁰ In *Paul*, Florida avocado growers sought to enjoin enforcement of a California statute that set standards for determining avocado maturity.¹¹¹ In essence, the conflict was between the California statute and a federal regulation promulgated by the De-

¹⁰⁴ *Id.* at 664-65. The treasury regulations dictated that survivors of co-owned savings bonds "will be recognized as the sole and absolute owner." *Id.* at 667 (quoting 31 C.F.R. § 315.61 (1959)). In addition, the treasury regulations provided that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations." *Id.* (quoting 31 C.F.R. § 315.20 (1959)).

¹⁰⁵ *Id.* at 663.

¹⁰⁶ *Id.*; see also *Wissner v. Wissner*, 338 U.S. 655, 659-60 (1950) (overturning state court decision where result of decision was preempted by National Service Life Insurance Act).

¹⁰⁷ *Free*, 369 U.S. at 669-70.

¹⁰⁸ *Id.* at 669.

¹⁰⁹ *Id.* at 670. Specifically, the Court held that "the state laws which prohibit a married couple from taking advantage of the survivorship provisions of United States Savings Bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause." *Id.*

¹¹⁰ 373 U.S. 132 (1963).

¹¹¹ *Paul*, 373 U.S. at 134-35.

partment of Agriculture that gauged the maturity by other methods.¹¹² The growers contended that it was impossible to comply with both standards.¹¹³ The Supreme Court explained that in certain situations conflicting regulations will allow federal preemption, but that in this particular case, preemption was not available.¹¹⁴ Specifically, it stated that "[t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."¹¹⁵ In *Paul*, the court concluded that both regulations could be enforced without compromising federal supremacy.¹¹⁶

The Court, in *Shaw v. Delta Air Lines, Inc.*,¹¹⁷ explained that preemption may occur where a federal law expressly creates a barrier to state regulation.¹¹⁸ In *Shaw*, the Court analyzed several provisions of the Employee Retirement Income Security Act (ERISA) as it applied to the New York Human Rights Act.¹¹⁹ The Court ruled that ERISA preempted the New York law regarding the ERISA benefits plan, because the state law went further than the federal law and prohibited practices considered lawful under ERISA.¹²⁰ In other words, the federal legislation created a barrier which the state law could not cross. ERISA expressly provides that it will preempt state law if the state law has a provision that "relate[s] to" the ERISA benefit plan.¹²¹ The Court applied the plain meaning of "relate[s] to" and stated that ERISA precluded states from passing similar laws.¹²² The *Shaw* Court, however, also ruled

¹¹² *Id.* at 133-35. California measured maturity by oil content, while the Federal standard did not consider oil content as a factor. *Id.* at 133-34.

¹¹³ *Id.* at 142-43.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 142.

¹¹⁶ *Paul*, 373 U.S. at 152.

¹¹⁷ 463 U.S. 85 (1983).

¹¹⁸ *Shaw*, 463 U.S. at 108.

¹¹⁹ *Id.* at 88-92.

¹²⁰ *Id.* at 108-09.

¹²¹ *Id.* at 91 (referring to ERISA § 514(a), 29 U.S.C. § 1144(a) (1988)).

¹²² *Id.* at 96-98. The Court explained its decision by stating:

that portions of ERISA did not preempt New York's Disability Benefits Law because the state law did not prohibit practices that were lawful under federal law, and because the state legislation basically coincided with federal law.¹²³

A fourth way that federal law may preempt state law is "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law."¹²⁴ In *Rice v. Santa Fe Elevator Corp.*, the Court considered a conflict between warehousemen, adhering to the United States Warehouse Act, and grain owners who argued that the Illinois Public Utilities Act and the Illinois Grain Warehouse Act applied.¹²⁵ The Court explained that because grain storage warehouses were involved in foreign commerce, they were in the "federal domain," and thus Congress could regulate them in totality.¹²⁶ The Court looked at the history of the federal act,¹²⁷ and noted that "Congress did more than make the Federal Act paramount over state law in the event of conflict. It remedied the difficulties

In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans.

Nor, given the legislative history, can § 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like.

Id. at 98.

¹²³ *Shaw*, 463 U.S. at 108-09.

¹²⁴ *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368 (1986).

¹²⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 200-22 (1947). In *Rice*, the plaintiff filed a complaint against the Santa Fe Elevator Corporation with the Illinois Commerce Commission. *Rice*, 331 U.S. at 220. Rice claimed the elevator rates were unjust and unreasonable. *Id.* at 220-21. In addition, it was alleged that the rates were excessive and discriminatory in favor of the Federal government and its agencies. *Id.* at 221.

¹²⁶ *Id.* at 229-30. The Court stated that the test for the breadth of federal power revolves around Congress' purpose in enacting the legislation in question. *Id.* at 230.

¹²⁷ *Id.* at 233.

which had been encountered in the Act's administration by terminating the dual system of regulation."¹²⁸ The Court noted the importance of one prevailing set of laws to ensure uniformity in all states.¹²⁹ The Supreme Court stated the test for preemption as "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."¹³⁰

Implied preemption may also occur where state law obstructs the accomplishment and execution of Congressional objectives. The Court elaborated on this type of implied preemption in *Hines v. Davidowitz*,¹³¹ in which it examined a Pennsylvania law that required aliens within the state to register with the proper state personnel once a year, and to carry with them a registration and card to be shown upon request of officials.¹³² The Court did not discuss the particular provisions of the Pennsylvania law, but concentrated on the jurisdiction of the federal government over immigration and naturalization.¹³³ Justice Black explained that "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.'"¹³⁴ Explaining the federal court's desire to preempt state law, the

¹²⁸ *Id.* at 234.

¹²⁹ *Id.* at 236.

¹³⁰ *Rice*, 331 U.S. at 236.

¹³¹ 312 U.S. 52 (1941).

¹³² *Hines*, 312 U.S. at 59-60. A district court panel of judges enjoined enforcement of the Act because it denied aliens over the age of 18 living in Pennsylvania equal protection of the laws and "encroached upon legislative powers constitutionally vested in the federal government." *Id.* at 60.

¹³³ *Id.* at 62.

¹³⁴ *Id.* at 66 (citations omitted); see also *Charleston & W.C. Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (stating that "state law is not to be declared a help because it attempts to go further than Congress has seen fit to go"); *New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 63 (1882) (holding that New York immigration statute cannot "coexist" with federal immigration law where both laws "covered the same ground").

Court further noted that:

where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard . . . , states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.¹³⁵

The desire of the Court for uniformity of regulation between the states is evident once again.

IV. PREEMPTION OF MISSISSIPPI PERSONAL INJURY LAW ON RIVERBOAT CASINOS

The principles of express and implied preemption previously discussed indicate that several federal statutes and regulations preempt Mississippi's statutory and common law regarding certain personal injury claims. Many personal injury claims arising out of accidents occurring on riverboat casinos bring into consideration many regulations promulgated by the Coast Guard and other entities which govern vessels. For example, existing regulations prescribe structural safety requirements, the number of people allowed on board and the manner in which the vessels are boarded and exited. The totality of these statutes and regulations so completely occupy the field of boat safety that they create express and implied preemption, allowing the claims to be brought in or removed to federal court.

¹³⁵ *Hines*, 312 U.S. at 66-67.

A. Federal Boat Safety Act - Express Preemption

Although a savings clause allows some suits to go forward under state law,¹³⁶ the Federal Boat Safety Act expressly preempts Mississippi law and requires certain personal injury suits to be tried in federal court. The preemption provision of the Act provides:

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.¹³⁷

This statute explicitly prohibits all states from establishing laws that conflict with the enumerated provisions of the Act.¹³⁸ In an analysis of an express preemption clause, a court must compare the applicable state law with the corresponding federal statute.¹³⁹ In the event that state statutory or common

¹³⁶ See *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991). In *Shields*, the court noted its belief that

Congress did not intend to occupy the entire field of boat safety regulation, but instead through the Act's preemption and savings clause wished to allow plaintiffs to assert common law claims and state law claims based on state statutes and regulations which have not been displaced by the Act, i.e., rules which are identical to those in the Act and do not conflict with its objectives There is room for concurrent state and federal regulation, but only to the extent allowed by the federal government.

Shields, 776 F. Supp. at 1582.

¹³⁷ 46 U.S.C.A. § 4306 (West Supp. 1994). Congress enacted this statute on August 26, 1983. *Id.*

¹³⁸ *Id.*

¹³⁹ See *supra* notes 117-23 and accompanying text.

law is contrary to a federal statute or regulation, the federal law will prevail.¹⁴⁰ However, state laws that establish standards or guidelines for boats on subjects other than those covered by the Federal Boat Safety Act will not be judged intrusive and invalid.¹⁴¹

Federal courts have held that the Federal Boat Safety Act preempts state personal injury and products liability law. In *Shields v. Outboard Marine*,¹⁴² a passenger on a recreational boat was hit and injured by the boat's propeller.¹⁴³ The passenger brought suit, alleging that her injuries were caused by a defective motor and arguing that state regulations rather than the Federal Boat Safety Act, should apply.¹⁴⁴ The court ruled that, although the Act had a "savings clause," the regulation of boat propellers was specifically addressed in the Act and the corresponding regulations promulgated by the National Boating Safety Advisory Council; therefore, the court was required to follow the federal law.¹⁴⁵ Noting that one of its goals was to promote uniformity of laws, the court stated that "[t]o allow a jury to decide the plaintiffs' claim would set a precedent for allowing other juries nationwide to decide questions of boat safety, which would result in a patchwork of regulations clearly inconsistent with the purpose of the Act."¹⁴⁶

In *Mowery v. Mercury Marine Corp.*,¹⁴⁷ decided two months prior to *Shields*,¹⁴⁸ the court held that the Federal Boat Safety Act preempted Ohio's products liability law.¹⁴⁹

¹⁴⁰ Bratton, *supra* note 80, at 624-25.

¹⁴¹ *Louisiana v. Nettleton*, 369 So. 2d 755, 759 (La. 1979) (holding state regulation of topic not covered by FBSA was not preempted by FBSA).

¹⁴² 776 F. Supp. 1579 (M.D. Ga. 1991).

¹⁴³ *Shields*, 776 F. Supp. at 1580.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1581-82. Deciding that the Act preempted state law, the *Shields* court reasoned that "[a] savings clause may not . . . preserve a state law or regulation which conflicts with the objectives of a federal law, even if it is possible to comply with both." *Id.*

¹⁴⁶ *Id.* at 1581.

¹⁴⁷ 773 F. Supp. 1012 (N.D. Ohio 1991).

¹⁴⁸ The district court in Ohio decided *Mowery* on August 13, 1991, while the Georgia district court decided *Shields* on October 30, 1991.

¹⁴⁹ *Mowery*, 773 F. Supp. at 1017.

Rejecting Ohio's law because of the express preemption clause of the Act, the court opined that the clause "explicitly evinces Congress' intent to prohibit states from promulgating recreational boating equipment safety standards that are not identical to those contained in the Act."¹⁵⁰ To formulate its decision, the court used the teleological method¹⁵¹ and reviewed the legislative history of the Act¹⁵² as well as the authority for the Secretary of Transportation's regulations.¹⁵³ The court ultimately concluded that an award of damages by the jury would allow the jury in effect to issue regulations on boat safety, a power and privilege saved for Congress and the federal agencies.¹⁵⁴ Both the *Mowery* and *Shields* courts asserted the supremacy of federal law to promote the legislative objective of uniformity throughout the country in boat safety regulations.

These cases show two courts' applications of the Federal Boat Safety Act rather than state law. A litigant seeking federal jurisdiction, therefore, could argue that any allegation of unsafe conditions on a riverboat casino is a federal question under the Boat Safety Act. The congressional intent to promul-

¹⁵⁰ *Id.* at 1014.

¹⁵¹ See Flint, *supra* note 88, at 326.

¹⁵² *Mowery*, 773 F. Supp. at 1014. The *Mowery* court examined and restated the Act's legislative history:

Section 10. Federal Preemption

This section [entitled Federal Preemption] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements

The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

Id. (quoting S. Rep. No. 248, 92d Cong., 1st Sess. 20 (1971), reprinted in 1971 U.S.C.C.A.N. 1333, 1341).

¹⁵³ 46 U.S.C.A. § 4302 (West Supp. 1994) provides that "[t]he Secretary may prescribe regulations—(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards." *Id.*

¹⁵⁴ *Mowery*, 773 F. Supp. at 1017.

gate uniform safety standards for recreational boating equipment extends both explicitly and by analogy to riverboat casinos. The *Mowery* and *Shields* cases reject the "saving to suitors" clause arguments even though the Boat Safety Act does not specifically regulate propeller guards. The courts in those cases rejected this argument to insure uniformity in decisions affecting boat safety and to prevent state court juries from making law by their findings.¹⁵⁵

Federal courts faced with cases involving "slip and fall" and other personal injury claims arising on Mississippi riverboat casinos could adopt the reasoning of the *Mowery* and *Shields* courts to extend federal jurisdiction to the actions. By applying the rationales of these two cases, federal courts have the authority to be as progressive as they desire in interpreting the Supremacy Clause of the United States Constitution and the express preemption of the Federal Boat Safety Act.

B. Federal Regulations-Implied Preemption

Mississippi personal injury law regarding riverboat casinos is also preempted by regulations promulgated by the Secretary of Transportation and the United States Coast Guard. "Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."¹⁵⁶ Though this preemption is implied, it is just as valid and binding as the express preemption of the Federal Boat Safety Act.

The key to implied preemption is the intent of Congress to so fully regulate an area that its laws will reign supreme over state law.¹⁵⁷ Congress' intent to regulate boat safety is evidenced by the delegation of authority to the Secretary of Transportation and the Coast Guard to extensively regulate boat

¹⁵⁵ *Id.*; see *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987) (noting single jury's potential power to thwart Congressional intent when state common law is allowed to encroach upon "well-defined area of federal regulation").

¹⁵⁶ *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986).

¹⁵⁷ See *supra* note 99 and accompanying text.

safety requirements. Congress has thereby comprehensively regulated the requirements for the safety of all types of vessels; thus, the field is "occupied" and state law is preempted. Specifically, the Secretary of Transportation has the power to create regulations "establishing minimum safety standards for recreational vessels"¹⁵⁸ and to conduct the research, testing and development needed to carry out vessel safety requirements.¹⁵⁹ These duties have been carried out by the establishment of regulations on the administration of boating safety¹⁶⁰ and safety equipment importation.¹⁶¹ The Secretary issues regulations concerning requirements of manufacturers to make all equipment in a specified manner and under very specific guidelines.¹⁶² Further regulations state that all vessels must receive a certificate of inspection,¹⁶³ and that the certificate must be aboard the vessel at all times so that passengers can easily view it.¹⁶⁴ The regulations go so far as to require that

¹⁵⁸ 46 U.S.C.A. § 4302(a)(1) (West Supp. 1994).

¹⁵⁹ *Id.* § 4303. This provision pertaining to the inspection and testing of vessels states:

(a) Subject to regulations, supervision, and reviews that the Secretary may prescribe, the Secretary may delegate to a person, private or public agency, or organization, or to an office or employee under the supervision of that person or agency, any work, business, or function related to the testing, inspection, and examination necessary for compliance enforcement and for the development of data to enable the Secretary to prescribe regulations under section 4302 of this title.

(b) The Secretary may—

(1) conduct research, testing, and development necessary to carry out this chapter, including the procurement by negotiation or otherwise of experimental and other recreational vessels or associated equipment for research and testing purposes; and

(2) subsequently sell those vessels.

Id.

¹⁶⁰ See 33 C.F.R. §§ 173.1-.83 (1994).

¹⁶¹ See 19 C.F.R. § 12.85 (1994).

¹⁶² See 33 C.F.R. §§ 181.1-703 (1994).

¹⁶³ See 46 C.F.R. § 71.01-1 (1993) ("Except as noted in this subpart or subpart 71.05, no vessel subject to inspection and certification shall be operated without a valid certificate of inspection.")

¹⁶⁴ See 46 C.F.R. § 71.01-5 (1993) ("The certificate of inspection shall be displayed under glass in a conspicuous place where observation by the passengers is likely.").

the inspection be conducted at least three times a year.¹⁶⁵ For enforcement purposes, Congress adopted legislation establishing penalties for certain violations of safety,¹⁶⁶ and empowered the Secretary to enact corresponding regulations for the suspension or possible revocation of a license to operate a vessel.¹⁶⁷ By establishing these laws for all aspects of operating a vessel, Congress has demonstrated its intent to legislate comprehensively and occupy an entire field of regulation.

In *Rice v. Santa Fe Elevator Corp.*, the United States Su-

¹⁶⁵ See 46 C.F.R. § 71.30-1 (1993). This section requires:

(a) In general, at least three reinspections shall be made on each vessel within one year. These reinspections will be made at approximately equal intervals between annual inspections. In the case of vessels with a seasonal schedule, reinspections will be made during the operating season if practicable.

(b) For those vessels subject only to the act of May 10, 1956 (46 U.S.C. 390-390g), reinspections will be made annually between inspections for certification.

46 C.F.R. § 71.30-1.

¹⁶⁶ See 46 U.S.C.A. § 2302 (West Supp. 1994). The penalties that may be levied by the government for negligent operations are as follows:

(a) A person operating a vessel in a negligent manner that endangers the life, limb, or property of a person is liable to the United States Government for a civil penalty of not more than \$1,000.

(b) A person operating a vessel in a grossly negligent manner that endangers the life, limb, or property of a person commits a class A misdemeanor.

(c) An individual who is under the influence of alcohol, or a dangerous drug in violation of a law of the United States when operating a vessel, as determined under standards prescribed by the Secretary by regulation—

(1) is liable to the United States Government for a civil penalty of not more than \$1,000 for a first violation and not more than \$5,000 for a subsequent violation; or

(2) commits a class A misdemeanor.

(d) For a penalty imposed under this section, the vessel also is liable in rem unless the vessel is—

(1) owned by a State or a political subdivision of a State;

(2) operated principally for governmental purposes; and

(3) identified clearly as a vessel of that State or subdivision.

Id.

¹⁶⁷ See 46 C.F.R. § 10.101 (1993) (stating regulations provide means of ascertaining who is qualified for maritime licenses).

preme Court held that the areas of federal regulation contained in the Federal Warehouse Act were dominant over any state law that came under it. The Court held that preemption occurs when "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."¹⁶⁸ Specifically regarding safety, the Court ruled that the federal law promulgating safety regulations was supreme over state law attempts at regulating the safety of grain elevators.¹⁶⁹

The federal regulations addressed in *Rice* concerning the safety of the elevators are similar to the safety requirements for the riverboat casinos in Mississippi. There have been both state and federal attempts to regulate safety. The Court noted that the state's attempts at regulation were broad and not all that different from the federal regulations, but held that the federal law was so dominant and exhaustive that it preempted all state safety law.¹⁷⁰ Similarly, Mississippi law on vessel safety is preempted by the exhaustive regulations passed by the Secretary of Transportation and the Coast Guard.

The characteristics of the *Rice* method for showing congressional intent are "pervasive regulation, dominant federal interest and unhampered operation."¹⁷¹ Clearly, the federal government has a "dominant" interest in regulating the safety of riverboat casinos on the Mississippi River and the Gulf of Mexico. It is apparent that Congress and its accompanying regulatory agencies have attempted to establish "pervasive regulation" of vessel safety as is evident by the thorough and comprehensive regulatory scheme.

The United States Supreme Court in *Shaw v. Delta Airlines, Inc.*, explained that preemption may also occur where there is an implicit barrier to state regulation within the federal regulation.¹⁷² One could argue that requiring manufactur-

¹⁶⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁶⁹ *Rice*, 331 U.S. at 227-28, 234.

¹⁷⁰ *Id.* at 234.

¹⁷¹ Bratton, *supra* note 80, at 633.

¹⁷² *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983).

ers of equipment on vessels to adhere to expansive guidelines presents a barrier to similar state standards on those same manufacturers. The regulations promulgated by the transportation department state that manufacturers are required to follow the department's specifications for equipment on vessels. This requirement arguably bars states from asserting that their standards for equipment must be followed by casino owners, regardless of whether the standards are based upon statute, regulation or common law.

Under the *Rice* and *Shaw* analyses, claims brought in state court that satisfy admiralty jurisdiction arguably may be removed to federal court based on Congress' implied intent to preempt state personal injury law. The most persuasive basis for removal is that federal regulation occupies the entire field of safety regulation on vessels. Attempts by Mississippi circuit courts to hear personal injury cases that sound in admiralty allow the court to create state vessel safety law.¹⁷³ This state law could directly conflict with federal regulations, thereby invoking federal jurisdiction of the cause of action under the preemption doctrine.¹⁷⁴ Therefore, personal injury claims that satisfy admiralty jurisdiction are removable to federal court, because the Federal Boat Safety Act and regulations of a federal agency create a federal question and preempt state law.

V. CONCLUSION

For a personal injury claim on a riverboat casino to create a federal question and be removed to federal court, several factors must be established. First, the party seeking removal must prove that the casino is, in fact, located on a vessel.¹⁷⁵ Next, one must satisfy the elements of admiralty jurisdiction under the *Sisson* and *Kelly* tests. Finally, one must prove that

¹⁷³ See *supra* notes 86, 136, 142-52 and accompanying text.

¹⁷⁴ See *supra* notes 86, 136, 142-52 and accompanying text.

¹⁷⁵ See *supra* note 17 and accompanying text. For the purposes of this article, we have assumed that the casinos in question satisfy the requirements of a vessel under admiralty jurisdiction. However, the classification of casinos as vessels for admiralty and maritime matters is not a foregone conclusion. See *supra* notes 15, 17.

a federal question exists due to federal preemption of the litigated area of law.

For personal injury claims that arise under admiralty jurisdiction, The Federal Boat Safety Act and regulations of the Secretary of Transportation and the Coast Guard provide for preemption of state law. The Boat Safety Act expressly preempts correlating state statutory and common law, and the regulations so occupy that field of law that the federal law will be considered supreme.

INDIAN GAMING: CONGRESS SENDS THE TRIBES INTO A CONSTITUTIONAL FRAY, BUT DID IT INTEND TO?

*Richard L. Barnes**

I. INTRODUCTION

Mississippi has managed to avoid a federal/state war. At its heart, the conflict over Indian gaming is a conflict over the power to regulate. From the federal perspective, Indian gaming is a matter of tribal sovereignty and national commerce of constitutional proportions.¹ From the state perspective, it represents a loss of control over an enterprise traditionally regulated by the states.² In many states Indian gaming means a loss of regulatory control and revenue which cannot be reached for taxation. In Mississippi, as in many other states, those who are unhappy about gaming may see the Choctaw casino on tribal land as adding insult to injury. Those who are comfortable with gaming must still accept the loss of regulatory control and the insulation of some gaming revenues from the state treasury.³ Acceptance of Congress' division of

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¹ Congress is given plenary power over Indian matters in U.S. CONST. art. I, § 8, cl. 3.

² U.S. CONST. amend. X.

³ The Mississippi Band of Choctaws does not share its gaming revenue with the State. Telephone Interview with Kathy Waterbury, Director, Miscellaneous

authority means the avoidance of a major blood letting by law suit. Other states and tribes have not avoided this conflict.⁴

*California v. Cabazon Band of Mission Indians*⁵ changed the landscape of the federal and state division of authority. First, the Court reiterated that the tribes retain some of the attributes of sovereignty and that tribal sovereignty depends on and is subordinate only to federal authority.⁶ The Supreme Court decided that state gaming laws are unenforceable on reservations within a state's borders if a state otherwise permits such gaming.⁷ Congress then perceived the regulatory vacuum⁸ and took up the Court's invitation to regulate.⁹

Absent Congress' express consent to state regulation, tribes acting within their reservations are sovereign.¹⁰ Congress' consent to state regulation is an exercise of its plenary power over Indian matters.¹¹ Congress could have regulated or even prohibited Indian gaming.¹² Congress responded to the *Cabazon Band of Mission Indians* decision with regulation through the Indian Gaming Regulatory Act (IGRA).¹³

Division of State Tax Commission (April 25, 1995).

⁴ See, e.g., *Cabazon Band v. National Indian Gaming Comm'n*, 14 F.3d 633 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 2709 (1994) (involving consolidated litigation including, among others, Eastern Band of Cherokees, Poarch Band of Creeks, San Manuel Band of Spokanes and Delaware Tribe of Western Oklahoma, with following states as intervenors: Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Kansas, Michigan, Mississippi, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming).

⁵ 480 U.S. 202 (1987).

⁶ *Cabazon Band of Mission Indians*, 480 U.S. at 207.

⁷ *Id.* at 220-21.

⁸ See Indian Gaming Regulatory Act [hereinafter IGRA], 25 U.S.C.A. § 2701(2), (3) (West Supp. 1994).

⁹ *Cabazon Band of Mission Indians*, 480 U.S. at 207.

¹⁰ *Id.* at 207.

¹¹ FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (1982).

¹² *Cabazon Band of Mission Indians*, 480 U.S. at 221.

¹³ 25 U.S.C.A. § 2701-2721 (West Supp. 1994).

II. OVERVIEW OF THE IGRA

In the IGRA, several groups share the regulatory role. First, Congress acknowledged its own power to guide federal Indian law.¹⁴ It then divided the remaining power between tribes and states, giving the power of regulation to the tribes where the activity is not prohibited by the state.¹⁵ To accomplish this division of power, gaming is divided into three categories.

Class I gaming is within the exclusive control of the tribes. This is little more than a prosaic signal that the tribes may continue traditional games, activities and ceremonies. These may have some aspects of gambling, but are not thought of as traditional gambling in the white culture. The keys are the social nature of the games as part of Indian culture and the games' minimal prizes.¹⁶

Class II gaming is a happenstance created by political developments just before the *Cabazon Band of Mission Indians* decision.¹⁷ The growth of bingo, including its electronic variations, has made this a distinct category. In it also are authorized card games which are played at other locations in the state. Because so many states have come to accept charitable bingo, and a smaller but still significant number have authorized some card games, Congress seems to accept the notion that this is a distinct category, somehow less invidious. Congress shows its higher confidence by conferring the right to offer these games if the state permits the same type of gaming to non-Indians.¹⁸ Federal power is preserved by the

¹⁴ *Id.* § 2701(2), (3).

¹⁵ *Id.* § 2710. This lengthy section explores and discusses tribal regulation of each class of gaming. *Id.*

¹⁶ *Id.* § 2703(6). Class I gaming involves purely tribal ceremonial games and celebrations. *Id.*

¹⁷ *Id.* § 2703(7). Subsection seven deals with activities that are acceptable as Class II gaming, as well as those activities that are clearly excluded. *Id.*

¹⁸ *Id.* Thrown into this category of bingo and authorized card games are other games played on tribal land in Michigan, North Dakota, South Dakota and Washington which were operating before the IGRA became law. *Id.* § 2703(7)(C).

requirement of approval of the tribal license or ordinance by the chairman of the National Gaming Commission.¹⁹

Class III gaming, a vast category, includes all other forms of gaming.²⁰ It is a default category; if it is not Class I or Class II then it is Class III. Class III gaming includes most of what the general public thinks of as gambling. It includes casino-type games such as card games, dice games, roulette and slot machines, pari-mutuel wagering, horse racing, dog racing and lotteries.²¹

This three-class scheme generates what appears to be a division of regulatory authority. While technically true, the reality is that the federal government remains preeminent while Congress defers to the states to control what games are played as well as the operating constraints. It reiterates federal preeminence by stating that the state control flows from Congress' grant of power. It is a grant that can be withdrawn by Congress should it decide to preempt the arena. While leaving the type of gaming to state judgment, it grants to tribes the power to operate with the state grant through tribal licensing authority. Congress chose to concentrate the exercise of federal power in the approval of tribal ordinances,²² approval of management contracts,²³ and closure of games or modifications to licenses for violations of the law and National Gaming Commission regulations.²⁴

There is virtually no affirmative statement of tribal authority over gaming. The IGRA comes closest to such a statement with regard to Class I gaming.²⁵ An affirmative grant of "exclusive jurisdiction" sounds very positive, but recall that this is Congress legislatively granting the power to tribes that

¹⁹ *Id.* § 2703(7).

²⁰ *Id.* § 2703(8).

²¹ *Id.*; see also *Cheyenne River Sioux Tribe v. State*, 3 F.3d 273, 275 (8th Cir. 1993) (discussing various types of Class I, II and III gaming).

²² 25 U.S.C.A. § 2710(d)(2)(b).

²³ *Id.* § 2711(b). This section lists requirements for approval of tribal management contracts. *Id.*

²⁴ *Id.* § 2713. Civil penalties may be imposed for regulatory violations. *Id.*

²⁵ *Id.* § 2710(a). Class I is the only gaming class under the complete jurisdiction of the tribe. *Id.*

are viewed as sovereigns in some respects. It is no more than another example of the paradox of the legislative branch of one sovereign specifying the role of an equal. The power of exclusive jurisdiction should not be gainsaid, yet it is a power that can be withdrawn by Congress.

Authority over Class II gaming appears to be shared between the tribe and the federal government. This two-party sharing is also an illusion. While the tribe determines whether to permit bingo and the allowed card games, and the federal gaming commission regulates them,²⁶ there is in each state the implied power to prevent Class II gaming by denying it to its other citizens.²⁷ A state intent on ending Indian gaming can do so by ending all gaming of that type within its territory.²⁸ This effectively reserves to the states a veto power where the affirmative power of control is given to the tribe. Both state and tribe then have the power to determine the extent and nature of gaming on the reservations. It may be a blunderbuss of a veto, requiring the state to have the fortitude to address wider issues of gaming policy, but it is power. The regulatory power to control the structure and manner of operation is retained, in large part, by the federal government.²⁹ The gaming commission determines compliance with licenses and the Gaming Act.³⁰

Also buried is the same inherent power seen above with Class I gaming. Congress can revisit the area and end Indian gaming or impose any additional restrictions appropriate in the exercise of its plenary power over Indian matters.³¹ This shared authority makes for the most complex of interlocking layers in the area most desirable for gaming development: casino-type gaming, the type chosen by the Choctaw Band in

²⁶ *Id.* § 2710(b). Certain conditions must be met before jurisdiction over Class II gaming can be conferred on the tribe. *Id.*

²⁷ *Id.*

²⁸ *Id.* § 2710(b)(1)(A). In order for gaming to be allowed on the reservation, the state must have legal gaming elsewhere within the state. *Id.*

²⁹ *Id.* § 2713.

³⁰ *Id.*

³¹ See *Cheyenne River Sioux Tribe*, 3 F.3d at 275.

Mississippi and many other tribes. The tribe is anything but preeminent.

The hypothesis developed in Parts B and C below is that the cases have overemphasized the constitutional questions of coordinate power and sovereignty. In Part B the constitutional basis for preeminent federal authority will be explored. The main purpose will be establishment of the scope of congressional power. It will be shown that this power was wielded lightly by Congress in deference to the state role. In Part C the political and constitutional implications of this decision to share power will be brought to the surface. It will show that the growing majority of cases which allows the tribes to sue states to implement the IGRA's provisions is correct, but the analysis would profit from greater reliance on purposive interpretation of the statute's provisions. To give Congress its due, the statute should be seen as a statement of its plenary power that does not raise constitutional questions. Congress could have bypassed the states, but in giving the states a role Congress did not cut into state sovereignty, it expanded it. The marginal loss in sovereign immunity is more than balanced by the increase in state influence over Indian matters.

A. *The Sovereign Immunity Issue*

During the early 1980s, Indian tribes began taking advantage of liberalized attitudes toward gaming in many states by operating high stakes bingo games.³² Indian gaming was first approved by the Supreme Court in *California v. Cabazon Band of Mission Indians*.³³ For the *Cabazon Band of Mission Indians* Court, the key issue was whether under state law gaming was a "civil/regulatory" rather than a "criminal/prohibitory" matter.³⁴

The Supreme Court noted that the inquiry into whether the state scheme was "civil/regulatory" in nature, should "proceed in light of traditional notions of Indian sovereignty and

³² *Cabazon Band of Mission Indians*, 480 U.S. at 204-05.

³³ *Id.* at 202.

³⁴ *Id.*

the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."³⁵ The Court held that a state was not justified in imposing its own regulatory scheme on tribal gaming operations in light of "compelling federal and tribal interests supporting them," concluding that such regulation would "impermissibly infringe on tribal governments."³⁶

The following year Congress addressed the issue of Indian gaming head-on by enacting the Indian Gaming Regulatory Act.³⁷ Congress sought to mediate the bitter dispute between many states and tribes with a compromise among the sovereigns.³⁸ Congress classified the various forms of gaming,³⁹ divided the authority, redrew the lines of authority to ensure that states were given a role, and authorized the tribes and states to negotiate the terms under which other forms of gaming would be played.⁴⁰

Congress reasserted its plenary power first established in *Worcester v. Georgia*.⁴¹ Its exercise came in response to the Court's affirmation of the plenary power and restatement that states lacked jurisdiction over Indian tribes and lands.⁴² Congress used its constitutionally-derived plenary power over Indian affairs to encourage states to participate through negotiated regulation.⁴³

³⁵ *Id.* at 216.

³⁶ *Id.* at 222.

³⁷ 25 U.S.C. §§ 2701-2721 (1988).

³⁸ *Id.* §§ 2701-2721.

³⁹ *See, e.g., id.* § 2703. The Act defines gaming by creating three "classes." Class I includes only "social games" with small prizes or traditional Indian games connected with tribal ceremonies or celebrations. Class II includes bingo, lotto, pull-tabs and other games similar to bingo. Class III includes all other forms of gaming. Class I games are regulated by the tribes. Class II games are regulated by the tribes and the Indian Gaming Commission. Class III games can only be lawfully played on reservations after a compact has been signed by tribe and state and approved by the Secretary of Interior. Regulation of such games is provided in the compacts themselves. *Id.*

⁴⁰ *Id.* §§ 2701-2721.

⁴¹ 31 U.S. (6 Pet.) 515 (1832).

⁴² *Worcester*, 31 U.S. (6 Pet.) at 520.

⁴³ 25 U.S.C. § 2710(d) (1988). During hearings on the IGRA, the states tes-

Congress provided that sovereign immunity from suit in specific and limited instances would be waived for both tribes and states.⁴⁴ In order to protect tribes from states refusing to negotiate over Class III gaming, thus frustrating tribal gaming rights, Congress granted tribes the right to sue states in federal court to complete the compacting process.⁴⁵ At the same time, Congress granted both tribes and states the right to sue each other for violations of approved compacts.⁴⁶ Finally, Congress gave the Secretary of Interior authority to bring suit against tribes or states if necessary to enforce Indian gaming regulations.⁴⁷

The legislative history of the IGRA supports the assertion that Congress was responding to the Supreme Court's call for congressional action where civil/regulatory matters are seen by the Court as being preempted by congressional power.⁴⁸

tified before Congress that they should be allowed to regulate Indian gaming. S. REP. NO. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.A.N. 3071, 3083.

⁴⁴ 25 U.S.C. § 2710 (1988).

⁴⁵ *Id.* § 2710.

⁴⁶ *Id.*

⁴⁷ The United States district courts shall have jurisdiction over

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures. . . .

25 U.S.C.A. § 2710(d)(7)(A).

⁴⁸ The legislative history of the IGRA states:

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal - Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that

Congress thought it had preempted state regulations,⁴⁹ and it thought this preemption would give states an incentive to participate in a regulatory partnership.⁵⁰

In recent suits by tribes against states under the IGRA, some circuit courts of appeal have found the Act to be an unlawful abrogation of state immunity.⁵¹ The district courts are also split on the Eleventh Amendment issue.⁵²

by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

Consistent with these principles, the committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

S. REP. NO. 446, 100th Cong. 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

⁴⁹ The legislative history of the IGRA states:

S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Id. at 3076.

⁵⁰ The legislative history states:

It is the Committee's intent that the compact requirement for Class III not be used as justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction.

Id. at 3083.

⁵¹ *Seminole Tribe v. Florida*, 11 F.3d 1016, 1026 (11th Cir. 1994). *Contra* *Cheyenne River Sioux Tribe v. State*, 3 F.3d 273, 280-81 (8th Cir. 1993).

⁵² *Compare* *Saul Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F.

B. Traditional Eleventh Amendment Views

1. Express Consent or Waiver

One bar to an Eleventh Amendment defense arises when the sovereign expressly consents to be sued.⁵³ The language used in waiving immunity must be clear and understandable because the Court will not imply waiver of the Amendment's protection.⁵⁴ Thus, if a state wishes, it can allow itself to be sued provided the language used clearly manifests this intent.

2. State Participation

Another way consent can be found occurs when a state participates in a federal program which mandates that the participant consent to suit. In *Parden v. Terminal Railway*,⁵⁵ the Supreme Court held that the state, as owner and operator of a railroad, could not plead sovereign immunity when it was sued under the Federal Employers' Liability Act.⁵⁶ The *Parden* ruling has not been extended by the Court. For instance, the Court did not imply consent when a state operated a non-profit hospital.⁵⁷ The Court also limited the *Parden* exception when a state participated in federal programs which

Supp. 1484 (W.D. Mich. 1992), *appeal dismissed*, 5 F.3d 147 (6th Cir. 1993) with *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991), *aff'd sub nom. Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994).

⁵³ See, e.g., *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 308-09 (1990) (holding that statutory consent provision acted to waive Eleventh Amendment immunity).

⁵⁴ See, e.g., *Feeney*, 495 U.S. at 305 (stating that waiver is effective only where clearly established by text); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (requiring clear indication of waiver), *reh'g denied*, 473 U.S. 926 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673, (stating that intent to waive immunity must be clear and unambiguous), *reh'g denied*, 416 U.S. 1000 (1974).

⁵⁵ 377 U.S. 184 (1964).

⁵⁶ *Parden*, 377 U.S. at 184-85. The Court rejected the argument of Alabama that the railway was a state agency which had not waived its sovereign immunity. *Id.* The Court held that by enacting FELA, Congress effectively abrogated sovereign immunity for the railway. *Id.* at 187-88.

⁵⁷ *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279 (1973).

provided federal funds in accordance with federal law.⁵⁸

3. *Express or Implicit Relinquishment of Sovereign Immunity*

The third type of case is one in which a private citizen sues a state, seeking money or injunctive relief. The basis of jurisdiction is consent by the state through its express or implicit relinquishment of sovereign immunity. The *Pennhurst State School and Hospital v. Halderman*⁵⁹ case is an example, as is *Parden v. Terminal Railway*.⁶⁰ In these Category III cases the three key characteristics are: (1) a private plaintiff; (2) monetary or injunctive relief sought against the state; and (3) an implicit consent to suit.⁶¹

*Blatchford v. Native Village of Noatak*⁶² was a bad case for the tribes only because there was no clear abrogation as there is with the IGRA. The Supreme Court is not hostile to jurisdiction which was explicitly granted in order to implement a congressional plan for its control of Indian affairs as trustee for the tribes. If one can see why the sovereign immunity cases are in separate categories, this proposition becomes clear. Because of the traditional deference paid to congressional acts in furtherance of its role as a tribal trustee, and because of the presence of a clear statement of abrogation, the IGRA cases should be nothing more than a continuation of the line of cases beginning with *Worcester v. Georgia*⁶³ in 1832

⁵⁸ See, e.g., *Atascadero State Hosp.* 473 U.S. at 246-47 (holding that acceptance of funds under federal Rehabilitation Act did not amount to consent to be sued in federal court); *Edelman*, 415 U.S. at 673 (stating that participation in program which provides federal monies for public transportation system does not establish consent to be sued).

⁵⁹ 465 U.S. 89 (1984).

⁶⁰ 377 U.S. 184 (1964).

⁶¹ We could construct other categories that might be close to the *Blatchford* category but in which jurisdiction is premised on consent as is the premise in category III. The key factors would be: (1) tribal suit, (2) money or injunction sought, and (3) consent alleged to waive sovereign immunity. Since our focus is on abrogation we will not look at cases in these other possible categories. Therefore, we will simply categorize those precedents which might control.

⁶² 501 U.S. 775 (1991); see *infra* notes 116-52, 164-68 and accompanying text for a discussion of *Blatchford*.

⁶³ 31 U.S. 515 (1832).

and continuing through *Morton v. Mancari*⁶⁴ and *Moe v. Confederated Salish and Kootenai Tribes*.⁶⁵ It is the principle of special congressional duty and power in Indian affairs that distinguishes the abrogation of immunity in this context making it appropriate where it might not be if it rested solely on the congressional power to regulate interstate commerce.

4. Abrogation of Sovereign Immunity

Most significant among the distinguishing factors which courts fail to consider is the importance of Congress' plenary powers under the Indian Commerce Clause. Congress' regulatory power in Indian affairs extends even to abrogation of the states' immunity. There can be no question that congressional power in the area of Indian affairs is plenary.⁶⁶ Courts are disregarding this clear principle. Most recently in *Seminole Tribe*, the Court of Appeals for the Eleventh Circuit said "that Congress, when it enacted [the] IGRA pursuant to the Indian Commerce Clause, lacked the power to abrogate the states' sovereign immunity."⁶⁷ Thus, the Indian Commerce Clause has one objective which is to empower Congress with the plenary authority to legislate in matters concerning Indi-

⁶⁴ 417 U.S. 535 (1974).

⁶⁵ 425 U.S. 463 (1976).

⁶⁶ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). "[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . ." *Id.* "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). "Congress has plenary authority over Indian affairs. This power is rooted in . . . the Indian Commerce Clause. . . ." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 361 (7th Cir.), *cert. denied*, 464 U.S. 805 (1973). "The nature of Congressional power in Indian matters is paramount and plenary." *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F. Supp. 279, 282 (C.D. Cal. 1969), *aff'd*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 1033 (1972).

⁶⁷ *Seminole Tribe*, 11 F.3d at 1024.

ans.⁶⁸

Courts are deciding, without proper supporting case law, that Eleventh Amendment immunity may only be abrogated under Section Five of the Fourteenth Amendment or the Interstate Commerce Clause. When confronted with a case involving the IGRA and the Indian Commerce Clause, courts invariably turn to cases which can be easily distinguished from the unique issues present in matters concerning Indians. *Pennhurst State School and Hospital v. Halderman* concerned a citizens' class action suit based on state law against a state institution seeking injunctive relief.⁶⁹ By a vote of five to four, the Court held that federal courts lack jurisdiction in suits for injunctive relief against state officials based on state law.⁷⁰ In *Atascadero State Hospital v. Scanlon*,⁷¹ an individual citizen brought suit based on federal law seeking monetary damages.⁷² By a vote of five to four, the Court held the suit was barred by the Eleventh Amendment because the federal law in question lacked a clear expression of unequivocal congressional intent to abrogate the immunity.⁷³ *Pennsylvania v. Union Gas Co.*,⁷⁴ involved a company sued by the federal government for environmental cleanup costs under a federal law who filed a third party complaint against the state seeking monetary damages.⁷⁵ By a five to four vote the Court held that the federal court has jurisdiction in a suit for damages by virtue of the congressional authority under the Interstate Commerce Clause.⁷⁶ Five Justices voted that the federal statute clearly expressed a congressional intent to permit suit for monetary damages against a state in federal court for conduct prohibited by the act in question.⁷⁷ Four of the ma-

⁶⁸ *Cotton Petroleum Corp.*, 490 U.S. at 192.

⁶⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 92-93 (1984).

⁷⁰ *Pennhurst State Sch. & Hosp.*, 465 U.S. at 89-91, 98.

⁷¹ 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985).

⁷² *Atascadero State Hosp.*, 473 U.S. at 236.

⁷³ *Id.* at 234-35, 242.

⁷⁴ 491 U.S. 1 (1989).

⁷⁵ *Union Gas*, 491 U.S. at 6.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* at 8.

jority Justices voted that Congress has the authority to make states liable for monetary damages pursuant to the Commerce Clause, while Justice White concurred that Congress has authority under Article I of the Constitution to abrogate the states' Eleventh Amendment immunity but did not agree with the supporting reasoning of the majority opinion.⁷⁸ In *Dellmuth v. Muth*,⁷⁹ a citizen sued based on federal law for monetary damages.⁸⁰ By a five to four vote the Court held that the Federal Act did not abrogate the state's immunity because the intent of Congress was not unmistakably clear in the Act.⁸¹

None of these cases are dispositive on a case involving the IGRA. When the IGRA is involved state law is not an issue. Similarly, monetary damages and injunctive relief are not of importance. Furthermore, a suit is not brought by an individual. The sole issue is whether Congress has authority under the Commerce Clause of the Constitution to waive state immunity for the specific purposes set forth in the IGRA when it clearly intends to do so.

As the closeness of the votes in these cases indicates, the Eleventh Amendment abrogation cases are complex, difficult cases. *Union Gas* especially is muddled by the plethora of diverging views on the reasons for approving or denying congressional abrogation in a specific act of Congress.⁸² But this much is clear: *Union Gas* establishes that Congress does have authority under Article I to abrogate a state's Eleventh Amendment immunity.⁸³ This clarifies and reinforces the majority opinions in *Atascadero* and *Dellmuth* which imply such authority if the language in the congressional enactment is explicit and unequivocal.⁸⁴

The fact remains, however, that courts around the country

⁷⁸ *Id.* at 14, 56-57.

⁷⁹ 491 U.S. 223 (1989).

⁸⁰ *Dellmuth*, 491 U.S. at 226.

⁸¹ *Id.* at 223-24.

⁸² *Union Gas*, 491 U.S. at 1.

⁸³ *Id.* at 14.

⁸⁴ *Atascadero State Hosp.*, 473 U.S. at 239-40; *Dellmuth*, 491 U.S. at 223.

sometimes make this fundamental error. *Union Gas* and the other interstate commerce cases do not speak directly to the question of abrogation when the issue concerns Indian affairs, which must be examined with reference to the Indian Commerce Clause.⁸⁵ Courts obscure the law by failing to distinguish the two distinct lines of cases, choosing instead to ensure the state will always win.

For Congress to abrogate the immunity granted by the Eleventh Amendment, the language of the statute must clearly demonstrate this intent.⁸⁶ The IGRA possesses just such clear language.⁸⁷ Thus, because of the language used in the IGRA, Congress intended to abrogate states' immunity under the Eleventh Amendment.

A second type of consent to suit is found in the "plan of the convention." The question under the plan of convention is whether the states surrendered their immunity when they ratified the Constitution. One example is waiver of immunity against suits by the United States.⁸⁸ Another exception to an Eleventh Amendment defense by a state is a waiver of immunity in a suit against a sister state.⁸⁹ In *Blatchford*, the Su-

⁸⁵ *Union Gas*, 431 U.S. at 1.

⁸⁶ *Union Gas*, 491 U.S. at 7. Acting under § 5 of the Fourteenth Amendment, Congress may override sovereign immunity granted by the Eleventh Amendment, but only by indicating its intent in an "unmistakenly clear" manner. *Id.*

⁸⁷ 25 U.S.C.A. § 2710(7)(A) (West Supp. 1994). The statute reads:

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

Id.

⁸⁸ See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (holding that no constitutional language or case law supported position that United States could not sue state).

⁸⁹ See, e.g., *South Dakota v. North Carolina*, 192 U.S. 286, 314 (1904) (stating that Court has jurisdiction over "controversies between two or more states").

preme Court confronted the issue of whether the states, by ratifying the Constitution, waived their immunity to suits by Indian tribes.⁹⁰ The Court drew a comparison between suits among states and suits among a state and an Indian tribe.⁹¹ Relying on the "plan of the convention" argument, the Court held the states did not waive their sovereign immunity.⁹²

5. *Other Recognized Exceptions: The Ex Parte Young Doctrine*

One exception to the Eleventh Amendment is a suit for injunctive relief. This exception allows a suit against a state official to prevent the enforcement of a state statute which violates the Constitution.⁹³ The *Ex Parte Young* fiction essentially withdraws sovereign immunity, which normally protects governmental officials, when the official attempts to enforce a state statute repugnant to the United States Constitution.⁹⁴ *Ex Parte Young* is effective in assigning responsibility to the individual actor when he attempts to act contrary to federal law or the Constitution.⁹⁵ Historically, *Ex Parte Young* has been the most successful foil to the Eleventh Amendment defense.⁹⁶ Even though a court may provide injunctive relief, a secondary effect of compliance with the order may involve the

⁹⁰ *Blatchford*, 501 U.S. at 781. The Court noted the lack of support for an argument that immunity to suits by tribes was waived through adoption of the Constitution. *Id.*

⁹¹ *Id.* at 782.

⁹² *Id.* The Court held that the surrender of immunity among states existed due to the mutuality of the surrender, a mutuality which did not exist with regard to Indian tribes since the tribes enjoyed immunity from suits by states. *Id.*

⁹³ See generally *Ex Parte Young*, 209 U.S. 123 (1908) (holding state Attorney General not immune to action seeking injunctive relief from enforcement of statute).

⁹⁴ *Ex Parte Young*, 209 U.S. at 159-60. The Court held that the state could not grant an official any immunity relieving him of his "responsibility to the supreme authority of the United States." *Id.*

⁹⁵ Christopher Lafuse, Note, *Beyond Blatchford v. Native Village of Noatak: Permitting the Indian Tribes to Sue the States Without Regard to the Eleventh Amendment Bar*, 26 VAL. U. L. REV. 639, 654 (1992).

⁹⁶ Kenneth C. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962).

disbursement of state funds. However, any monetary repercussions from a court decision are only ancillary and therefore permissible.⁹⁷

Ex Parte Young cannot be used in two specific instances. Executive officials cannot be compelled to perform discretionary acts.⁹⁸ Additionally, the doctrine is not allowed by the courts if the suit is really against the state.⁹⁹

Allowing tribes to sue is similar to other recognized exceptions. Justice Scalia raised a similar objection in *Union Gas*, when he sought to distinguish *Fitzpatrick v. Bitzer*¹⁰⁰ as merely a later limitation on the Eleventh Amendment by the Fourteenth Amendment.¹⁰¹ Justice Brennan, however, observed, "It would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power."¹⁰²

The United States District Court for the District of Kansas also rejected this objection in a recent Indian abrogation case, stating, "Assuming chronology was relevant to the Constitutional analysis, Justice Brennan rightly observed that the principle of sovereign immunity, which the Eleventh Amendment is said to affirm, existed well before the states even ratified the Constitution."¹⁰³ The Supreme Court long ago held in *Ex Parte Young* that every suit against a state official is not a suit against a state. The trial court ruled that the *Ex Parte Young* doctrine does not apply in the instant case be-

⁹⁷ *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

⁹⁸ *Ex Parte Young*, 209 U.S. at 158. The Court noted that an official could be compelled to perform only those tasks ministerial in nature. *Id.*

⁹⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). A suit against a state, disguised as a suit against an official, is barred regardless of whether the relief sought is monetary damages or an injunction. *Id.* at 102.

¹⁰⁰ 427 U.S. 445 (1976).

¹⁰¹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 41-42 (1989) (Scalia, J., concurring in part and dissenting in part).

¹⁰² *Union Gas*, 491 U.S. at 18. Justice Brennan argued that the Eleventh Amendment did not affect congressional power to abrogate sovereign immunity. *Id.*

¹⁰³ *Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423, 1429 (D. Kan. 1993), *aff'd*, 37 F.3d 1422 (10th Cir. 1994).

cause the tribe "does not seek to compel him to perform a neglected ministerial act."

*Hafer v. Melo*¹⁰⁴ was a suit for monetary damages against a state official for wrongful dismissal of state employees.¹⁰⁵ In *Hafer*, the Court distinguished between "official-capacity" and "personal-capacity" claims.¹⁰⁶ The Court held, under the reasoning of *Scheuer v. Rhodes*,¹⁰⁷ that state officials are not absolutely immune from personal liability even when their acts are necessary to carrying out the functions of government.¹⁰⁸

The IGRA cases fall within the nature of "prospective" relief approved by the Court under the *Ex Parte Young* doctrine in *Edelman v. Jordan*.¹⁰⁹ There the Court noted that *Ex Parte Young* required a state attorney general "to conform his future conduct of that office to the requirement of the Fourteenth Amendment."¹¹⁰

The relief sought and granted in *Ex Parte Young* and *Edelman* are analogous to the relief sought by a tribe. The tribes seek under the IGRA only orders for the governors to prospectively comply with the IGRA. The orders would require the governors to carry out the affirmative duty under the IGRA of negotiating in good faith. The IGRA does not compel a governor to approve a compact if he does not choose to. The Act provides the governor two options, either (1) to negotiate in good faith, or (2) to advise the tribe that he does not wish to participate in gaming regulation. The tribe then could seek

¹⁰⁴ 502 U.S. 21 (1991).

¹⁰⁵ *Hafer*, 502 U.S. at 23.

¹⁰⁶ *Id.* at 25. The Court referred to *Kentucky v. Graham*, 473 U.S. 159 (1985), and defined "official-capacity" actions as actions against the government entity framed as actions against an officer. *Id.* The Court further stated that "personal-capacity" actions sought to impose liability upon an official as an individual "for actions taken under color of state law." *Id.*

¹⁰⁷ 416 U.S. 232 (1974).

¹⁰⁸ *Hafer*, 502 U.S. at 28. The Court stated that a grant of absolute immunity required an "inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 28-29.

¹⁰⁹ 415 U.S. 651 (1974).

¹¹⁰ *Edelman*, 415 U.S. at 664.

approval of its plan from the Secretary of Interior without participation by the state.

Congress chose not to impose a federal regulatory scheme on the states' gaming policy and operations but merely provided "incentives" for the states to negotiate in good faith with the tribes for mutual benefit. Framing the regulatory scheme in terms of "incentives" for the state rather than imposing direct federal regulation indicates not only a close reading of recent Supreme Court rulings but careful attention to the Court's articulated tests for express abrogation of the states' sovereign immunity.

In *New York v. United States*,¹¹¹ for example, the Supreme Court held that monetary and access "incentives" in the Low-Level Radioactive Waste Policy Amendments Act of 1985 did not violate the Tenth Amendment.¹¹² The Court noted that "[t]his is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out *incentives* to the States as a method of influencing a State's policy choices."¹¹³

6. *The Implications of Congressional Power for Sovereign Immunity*

Recent court decisions have erroneously concluded that Congress lacks authority under the Indian Commerce Clause to abrogate the Eleventh Amendment.¹¹⁴ The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state."¹¹⁵ Recent actions brought by Indian tribes against states were unsuccessful due to the Eleventh Amendment

¹¹¹ 112 S. Ct. 2408 (1992).

¹¹² *New York*, 112 S. Ct. at 2427.

¹¹³ *Id.* at 2423 (emphasis added).

¹¹⁴ *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994).

¹¹⁵ U.S. CONST. amend. XI.

defense. Some decisions concluded the state had neither expressly nor impliedly waived its immunity from suit. Other courts held that while Congress may abrogate a state's immunity through Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause, this power is unavailable to Congress under the Indian Commerce Clause. These courts concluded, therefore, that Congress lacks the power under the Constitution to abrogate the Eleventh Amendment, even when exercising its powers granted in Article I under the Indian Commerce Clause. This reasoning is wrong.

The majority of courts dismissing tribal suits to enforce the IGRA saw this as no more than an extension of *Blatchford v. Native Village of Noatak*.¹¹⁶ *Blatchford* was an action against Alaska to establish the Tribe's right to revenue which the State diminished in a way that the Tribe believed violated its rights.¹¹⁷ In other words, the decision reached only the issue of whether a lawsuit could be maintained to establish the State's monetary obligation under a state-created program.¹¹⁸ The *Blatchford* Court specifically reserved judgment as to the propriety of a lawsuit to establish the right to injunctive relief.¹¹⁹ The Tribe's argument for jurisdiction over its claim of monetary obligation was predicated on the general grant of jurisdiction contained.¹²⁰ The Court refused to read this as adequate to reflect an "unmistakably clear intent" by Congress to abrogate Eleventh Amendment immunity.¹²¹ The Act's general grant of jurisdiction was not enough to overcome the State's reserved sovereign immunity where the Tribe sued for monetary damages.¹²²

Most significant is the *Blatchford* Court's determination that there is not inherent in the Eleventh Amendment an exception for a tribe to sue a state. In other words, the Court

¹¹⁶ 501 U.S. 775 (1991).

¹¹⁷ *Blatchford*, 501 U.S. at 775.

¹¹⁸ *Id.* at 778-79.

¹¹⁹ *Id.* at 788.

¹²⁰ See 28 U.S.C.A. § 1362 (West 1984).

¹²¹ *Blatchford*, 501 U.S. at 785.

¹²² *Id.* at 786.

did not buy the "in the plan of the convention" traditional exception for suits by one state against another.¹²³ The tribe was treated more as a foreign state rather than a domestic sister state for Eleventh Amendment purposes.¹²⁴ Without this traditional exception and without an express abrogation by Congress, the majority opinion pauses only shortly before doing away with jurisdiction over the monetary claim.¹²⁵ The case fits traditional Eleventh Amendment analysis if viewed as a straightforward failure by Congress to unmistakably abrogate the states' immunity to federal suit.¹²⁶

C. Sovereign Immunity and the IGRA

When they apply tradition and sovereign immunity principles to the IGRA provision permitting the tribes to sue the states, the courts are trying to make *Blatchford* something it is not by forming an amalgam of its holding and the traditional reluctance to find clear abrogations or waivers of immunity by the states. By shifting from *Blatchford* into the wholly separate line of cases which discuss immunity in the context of ordinary domestic citizen suits, the courts bring into the discussion a group of cases inapposite where the special relationship of tribe, state and federal government is in question. Simply because *Blatchford* involves sovereign immunity does not lead one inexorably to the conclusion that all sovereign immunity cases and doctrines are applicable.

The courts should filter out those cases not involving tribal suits and consider *Blatchford* in its tribal suit context. Instead, the courts begin with *Blatchford's* conservative statement about abrogation and pile onto it the Court's reluctance to find abrogation or waiver of immunity in other contexts, typically simple interstate commerce cases of ordinary citizens from one state suing another state. Courts try to escape being caught in this collapsing of doctrines by the simple move of

¹²³ *Id.* at 782.

¹²⁴ *Id.*

¹²⁵ *Id.* at 778-88.

¹²⁶ *Blatchford*, 501 U.S. at 785-86.

noting that the Supreme Court has drawn the distinction between Interstate Commerce Clause cases and Indian Commerce Clause cases, warping the Court's simple observation that a distinction exists into doubtful inferences that congressional power is somehow lessened in Indian matters.¹²⁷ They offer no authority for this.

Representative of this approach is the court's holding that the IGRA violates principles of sovereign immunity found in *Poarch Band of Creek Indians v. Alabama*.¹²⁸ There the court drew the same inference of lessened authority,¹²⁹ and bolstered it with the almost irrelevant observation that the Supreme Court's major pronouncement on the great extent of congressional power, the pronouncement found in *Union Gas*, an Interstate Commerce Clause case, was a bare plurality.¹³⁰ Here is the fallacy. Just because the Court's doctrinal understanding of abrogation in Interstate Commerce Clause cases is unclear, that does not mean that the same weakness should be carried over to Indian Commerce Clause cases. The courts are unwilling to see the political flip side of the coin they hold. They fail to recognize that the distinction between Indian and interstate commerce cases might lead to a conclusion of greater power where Congress seeks to abrogate immunity in Indian matters. The lower courts seem to reason from a political premise that it is good to bring the tribes more within the states' power. They see constitutional doctrine to support this where there is none. The Supreme Court's stated distinction between interstate commerce power and Indian affairs can be used to say that the limitation in interstate commerce cases is wholly inapplicable.

¹²⁷ See, e.g., *Spokane Tribe v. Washington*, 790 F. Supp. 1057, 1060-61 (W.D. Wash. 1991), *rev'd*, 28 F.3d 991 (9th Cir. 1994).

¹²⁸ 776 F. Supp. 550 (S.D. Ala. 1991), *aff'd sub nom.* *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994).

¹²⁹ *Poarch Band of Creek Indians*, 776 F. Supp. at 559.

¹³⁰ *Id.* at 558-59.

D. Blatchford Does Not Diminish the Plenary Powers of Congress in Indian Affairs

What I offer below is an analysis of the decisions which trace this tension to differences found in the separate, but related doctrines surrounding Indian Commerce Clause and Interstate Commerce Clause cases. This distinction can be used to place our issue within the framework of Eleventh Amendment doctrine in two very different ways. One way is to use it as the majority of district courts have and see a further strengthening of sovereign immunity. The other is to see it as a strengthening of Congress' power to abrogate based on its special role as trustee of tribal integrity and administrator of tribal power.

In *Blatchford*, a tribe filed suit against a state seeking both monetary damages and injunctive relief under a federal jurisdictional statute.¹³¹ By a six to three vote, the Court held that suit for monetary damages was barred by the Eleventh Amendment because the State had not consented to suit, it had not waived its immunity against tribes in the "plan of the convention," and the federal jurisdictional statute on which the suit was based was neither a general delegation to tribes of the federal government's authority to sue states on behalf of the tribes nor an abrogation of the states' immunity.¹³² The Court did not rule on the abrogation of the injunctive relief claim and remanded that issue to the lower court.¹³³

If a court views the IGRA provision as merely an extension of *Blatchford*, it is in error. This is a serious misreading of *Blatchford*, because *Blatchford* did not involve a clear statement of congressional intent.¹³⁴

The *Blatchford* Court reached only the question of wheth-

¹³¹ *Blatchford*, 501 U.S. at 778.

¹³² *Id.* at 778-88.

¹³³ *Id.* at 788.

¹³⁴ *Id.* at 786.

er tribes could sue a state for monetary damages.¹³⁵ This makes it a poor precedent for the IGRA's injunctive relief provision. The Court specifically reserved judgment on the claim for injunctive relief.¹³⁶ The Court further ruled that the jurisdictional statute underpinning that suit did not reveal an "unmistakable clear intent" by Congress to abrogate the immunity.¹³⁷ On this basis, *Blatchford* should be read as a traditional Eleventh Amendment analysis of the failure of Congress to clearly state its intent to abrogate the states' immunity. Under such a reading, the result in *Blatchford* does not compel a dismissal in this case. Indeed, the case implies that a clear congressional statement of intent would have supported jurisdiction.¹³⁸ But in any event, because the Court in *Blatchford* never reached the issue in the present case—congressional power to abrogate—it cannot be dispositive.

It is also notable that in *Blatchford*, Justice Scalia not only passed up an opportunity to overrule *Union Gas*, but he did not even bother to distinguish it.¹³⁹ Instead, in *Blatchford* the Court addressed *Moe v. Confederated Salish and Kootenai Tribes*,¹⁴⁰ and ignored the quagmire of *Union Gas*.¹⁴¹

Turning to *Moe* rather than attempting to distinguish *Union Gas* is the correct move. Use of *Moe* recognizes that the Indian commerce cases, rather than the interstate commerce cases, contain the appropriate doctrines.¹⁴² The Court found in *Moe* that the Indian tribes could sue states on matters "arising under the Constitution" and laws of the United States "in some respects as broad as that of the United States suing

¹³⁵ *Id.* at 788.

¹³⁶ *Blatchford*, 501 U.S. at 788.

¹³⁷ *Id.* at 786.

¹³⁸ *Id.*

¹³⁹ *Id.* at 778-88.

¹⁴⁰ 425 U.S. 463 (1976).

¹⁴¹ *Blatchford*, 501 U.S. at 783-86.

¹⁴² *Moe*, 425 U.S. at 473-75.

as the tribe's trustee."¹⁴³ In *Moe*, a tribe sued a state in federal court for injunctive relief from state taxation. The *Blatchford* Court refused to extend the "in some respects" language of *Moe* into a "general" access to the federal courts.¹⁴⁴ Also, the purported hindrance to jurisdiction in *Moe* was another federal statute, a congressionally-created limitation rather than a constitutional one.¹⁴⁵

By focusing on *Moe* and the language of 28 U.S.C. § 1362, the *Blatchford* Court tacitly recognized that a clear statement of abrogation in an area traditionally reserved to Congress, such as tribal affairs, makes the matter so special that the otherwise significant case of *Union Gas* is not even worth mentioning.¹⁴⁶ Immunity might stand but it must at least be questioned with traditional deference to congressional management of Indian affairs.

Blatchford simply does not support an inference that congressional control over Indian affairs is of a lesser constitutional moment. The majority opinion of Justice Scalia, who vigorously dissented in *Union Gas*, marshals arguments to defeat both abrogation and the idea of state consent to suit.¹⁴⁷ If lessened deference to the Indian Commerce Clause were plausible it would certainly have been set forth in the *Blatchford* majority opinion.

E. Three Categories of Sovereign Immunity Cases

The Indian Gaming Regulatory Act was enacted under Congress' legislative grant found in the Indian Commerce Clause.¹⁴⁸ In the same sentence of Article I where the Interstate Commerce Clause is found so also is the Indian Commerce Clause. Extending the logic of *Union Gas*, the Indian

¹⁴³ *Id.* at 465-66.

¹⁴⁴ *Blatchford*, 501 U.S. at 783-84.

¹⁴⁵ *Id.* at 783-86.

¹⁴⁶ *Id.* at 778-88.

¹⁴⁷ See U.S. CONST. art. 1, § 8; see also Joseph J. Weissman, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WAS. L. REV. 123, 154 (1993).

¹⁴⁸ Weissman, *supra* note 147, at 154.

Commerce Clause, like the Interstate Commerce Clause, must also be a plenary power of Congress.¹⁴⁹ If the Interstate Commerce Clause can limit the actions of a state, so also must the Indian Commerce Clause limit the same state's actions.¹⁵⁰

In *Seminole Tribe v. Florida*,¹⁵¹ the Court of Appeals for the Eleventh Circuit held that even though Congress plainly and clearly intended to abrogate the sovereign immunity of states in the IGRA, Congress lacks the power under the Constitution to abrogate the Eleventh Amendment, even when exercising its powers granted in Article I under the Indian Commerce Clause.¹⁵²

The Eleventh Circuit Court of Appeals and other courts around the United States which refuse to recognize the plenary power of Congress under the Indian Commerce Clause err in a clearly recognizable manner. Courts lump all Eleventh Amendment cases together and fail to properly consider the effects of distinguishing circumstances. These distinguishing circumstances include: (1) some cases are based on express congressional abrogation while others rely on implicit or consensual abrogation of sovereign immunity; (2) the identity of parties, with some cases brought by individual citizens and others by sovereign Indian tribes; and (3) the identity of claims, that is, that some cases involve claims for monetary damages while others involve injunctive relief.

It is the interplay of these three distinguishing circumstances which created the three distinct categories of abrogation cases. In Category I, the focus is on the origin of abrogation. The strongest case is where abrogation is express and flows from Congress' constitutional power. Category II cases focus on the relief sought. Injunctions are more favorably viewed than a request for monetary damages. Category III cases are distinct because the focus is on the identity of the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 11 F.3d 1016 (11th Cir. 1994).

¹⁵² *Seminole Tribe v. Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994).

parties. One state suing another is a strong case for abrogation; a private foreign citizen suing a state represents a weak circumstance.

F. Blatchford Does Not Diminish Congress' Plenary Power

*1. Explicit Abrogation is the Key Factor
in Distinguishing Categories*

A survey of the Supreme Court's decisions on sovereign immunity suggests that there is much to the Eleventh Amendment that is not present in its succinct words.¹⁵³ While the words mean little, the various principles of subject matter jurisdiction, limits on federal diversity jurisdiction and common law sovereign immunity have all been used to impart meaning. The Court's Brobdingnagian jurisprudence leaves clarity behind in favor of breadth and complexity. Despite this, there are some common factors that will help us determine the propriety of the IGRA's remedial provision. These factors include (1) identity of the party suing; (2) relief sought, and (3) basis for subjecting the state to a suit.

As to identity, the most suspect class of suits is those against a state by a private citizen of another state. These lawsuits fall squarely within the language of the Eleventh Amendment and involve a factual scenario similar to *Chisholm v. Georgia*,¹⁵⁴ which spurred adoption of the Amendment.¹⁵⁵ Much less controversial are suits against a state by the United States or other state.

Because of its origin, great jurisprudential energy has gone into discussion of the second factor: relief sought. Mone-

¹⁵³ The language of the Eleventh Amendment reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

¹⁵⁴ 2 U.S. (2 Dall.) 419 (1793).

¹⁵⁵ Lafuse, *supra* note 95, at 645-46. *Chisholm* was an action initiated by a South Carolina citizen against the state of Georgia. *Id.* at 645. In response to *Chisholm*, where the Supreme Court held that the federal courts had jurisdiction, Congress proposed and passed the Eleventh Amendment. *Id.* at 645-46.

tary awards are most suspect, while injunctive relief is more favored. The idea is that, like the power to tax, the power to sue for money is the power to destroy. This principle also reflects the common law concern of protecting the sovereign's treasury.

The third factor is the basis for making the state amenable to suit. The three most common bases are (1) "plan of the convention," (2) federal removal of the bar in order to make workable federal power, and (3) consent of the state, express or implied.¹⁵⁶

Suppose we begin by pegging *Union Gas* as a "Category I" case. In *Union Gas*, a private citizen sued a state seeking money damages.¹⁵⁷ The federal court jurisdiction was premised on congressional power to regulate interstate commerce.¹⁵⁸ The key factors for a Category I case are: (1) citizen suing state, (2) money sought, and (3) interstate commerce power invoked.

2. Some Category I Cases and Traditional Sovereign Immunity

Abrogation of a state's immunity can be accomplished through legislation passed by Congress under the Interstate Commerce Clause of the Constitution. The Supreme Court allows a state's immunity to be limited if Congress acts pursuant to Article I of the Constitution under the Interstate Commerce Clause.¹⁵⁹ The Court held in *Pennsylvania v. Union Gas* that Congress can abrogate a state's immunity when legislating pursuant to the Interstate Commerce Clause.¹⁶⁰ *Union Gas* addressed whether a state could be sued for damages in federal court under the Comprehensive Environmental

¹⁵⁶ See *supra* notes 66-92 and accompanying text.

¹⁵⁷ *Union Gas*, 491 U.S. at 5-6.

¹⁵⁸ *Id.* at 15. The Court acknowledged that although the issue had never been squarely addressed, congressional power under the Commerce Clause included the power to abrogate immunity. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see also Lafuse, *supra* note 95, at 658 (discussing holding of *Union Gas*).

Response, Compensation, and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act (SARA).¹⁶¹ A plurality of the Court held the state's immunity was abrogated by CERCLA and SARA even though this legislation was passed under the Interstate Commerce Clause.¹⁶² The plenary power of Congress under the Interstate Commerce Clause provides power to the federal government which can limit the power of the states.¹⁶³

3. *Category II Cases*

Blatchford is a Category II case. The key factors for a Category II case are: (1) tribe suing state, (2) money and injunctive relief sought, and (3) Indian powers invoked.

In *Blatchford*, native villages of Alaska instituted an action against a state official seeking a court order which would require the state to make payments to the villages, which were allegedly warranted under a revenue-sharing statute.¹⁶⁴ The district court granted an injunction, then dismissed the claim as a violation of the Eleventh Amendment.¹⁶⁵ The Court of Appeals for the Ninth Circuit reversed, holding that the State enjoyed no immunity from suits brought by Indian tribes.¹⁶⁶ The Supreme Court held that the Eleventh Amendment barred claims for monetary damages by Indian tribes against a state absent congressional abrogation of immunity or state consent which were not present in the case.¹⁶⁷ The

¹⁶¹ *Union Gas*, 491 U.S. at 5. CERCLA is codified as amended at 42 U.S.C. §§ 9601 *et seq.* (1988).

¹⁶² *Lafuse*, *supra* note 95, at 658 n.164. The plurality consisted of Brennan, Marshall, Blackmun and Stevens. *Id.*

¹⁶³ *Lafuse*, *supra* note 95, at 658.

¹⁶⁴ *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 778 (1991). The Native Village challenged the actions of the Commissioner of Alaska's Department of Community and Regional Affairs who had altered the scope of the revenue-sharing program, causing less money to be paid to the native village. *Blatchford*, 501 U.S. at 778.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* The court of appeals initially held that 28 U.S.C. § 1362 abrogated the state's immunity, then on reconsideration held that suits by Indian tribes were not within the scope of the state's immunity. *Id.*

¹⁶⁷ *Id.* at 779-88. The Court rejected arguments by the native village seeking

Supreme Court remanded the tribe's claim seeking an injunction to the lower court.¹⁶⁸

4. *Category III Cases*

One of the fundamental purposes behind the Eleventh Amendment was to prevent suits against a state which would result in the payment of damages. In order to protect state budgets, therefore, suits for damages are not allowed under the Amendment unless one of three exceptions is present. In Category III cases, we focus on this basis for abrogating sovereign immunity. Most controversial are suits in which the basis is unclear or weak. Least controversial are suits in which Congress has waived the immunity or the state has consented to being sued. Because the IGRA's relief is in the nature of an injunction, it presents the best circumstance for abrogating state immunity.

III. THE SPECIAL STATUS OF INDIAN NATIONS AND TRIBES

Any intelligent exploration of Native American legal matters must begin with the relationship between Indian tribes and the United States. It is necessary to examine this paradigm since "Indian law is founded in the political relationship between the United States and the Indian tribes."¹⁶⁹ From the outset, however, one discovers that Indian law is a complex mixture of many elements from many different areas of the human experience. As Felix Cohen explained, "Our Indian law originated, and can still be most clearly grasped, as a branch of International law. . . ."¹⁷⁰ Both explorers and settlers on the newly "discovered" North American continent found themselves confronted by firmly established aboriginal peoples. All the land, therefore, was not uninhabited and free

to establish an absence of immunity or, in the alternative, state consent to suit or congressional abrogation of immunity. *Id.*

¹⁶⁸ *Id.* at 788.

¹⁶⁹ F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (1982).

¹⁷⁰ Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942).

for the taking. Negotiations with Indians became a necessity. "Whatever theoretical conflicts existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists."¹⁷¹ Thus, a subtle yet paramount distinction of historical fact arises in

[t]hat practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners. What we acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession. What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.¹⁷²

After the founding of the United States in 1776, the need to negotiate with Native Americans became the responsibility of the new government. The presence of the Indian Commerce Clause in Article I of the United States Constitution clearly illustrates this point.¹⁷³ While the United States continued to grow, the power and influence of the Indian nations diminished. Then, in *Worcester v. Georgia*,¹⁷⁴ Chief Justice Marshall endeavored to explain what position Indian tribes possessed in relation to the United States.¹⁷⁵ Chief Justice Marshall wrote, "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."¹⁷⁶

¹⁷¹ Cohen, *supra* note 170, at 55.

¹⁷² *Id.*

¹⁷³ See U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁴ 31 U.S. (6 Pet.) 515 (1832).

¹⁷⁵ *Worcester*, 31 U.S. (6 Pet.) at 557-61.

¹⁷⁶ *Id.* at 557.

This premise is based on the power granted to Congress by the Indian Commerce Clause.¹⁷⁷ Chief Justice Marshall concluded that Georgia's laws "interfere[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union."¹⁷⁸

But how does an Indian tribe acquire its special place in American law?¹⁷⁹ An Indian tribe must be federally recognized. "Historically, the federal government has determined that certain groups of Indians will be recognized as tribes. . . ."¹⁸⁰ "In most instances the question of tribal existence can be resolved by reference to a treaty, statute, executive order, or agreement recognizing the tribe in question."¹⁸¹ Tribes can also be recognized if they receive services through the Bureau of Indian Affairs.¹⁸² "Such determinations are incident to the Indian Commerce Clause of the Constitution

. . . .¹⁸³

After examining the United States-Indian tribe relationship, the next issue is to determine what limits on tribal sovereignty exist. The greatest impediment Indian nations confront

¹⁷⁷ *Id.* at 559.

¹⁷⁸ *Id.* at 561.

¹⁷⁹ In discussing Indian tribes the only issue is what is necessary to achieve political recognition. The classification of tribes from an ethnological approach is beyond the scope of this paper and will, therefore, be omitted.

¹⁸⁰ Cohen, *supra* note 170, at 3.

¹⁸¹ Even though treaties are no longer made with Indian tribes, treaties remain an important source of federal Indian law. 25 U.S.C. § 71 (1976) (ending powers of federal government to make treaties with Indian tribes as of March 3, 1871, but upholding validity of treaties made prior to that date). One treaty example is the Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478 (treaty of New Echota). An example of a statute is the Indian Trade and Intercourse Act. 25 U.S.C. § 177 (1976). Executive actions created Indian reservations when in 1855 the President withdrew land for Indian use. Exec. Order of May 14, 1855. Congress eliminated the power to create reservations through executive order in 1919. 43 U.S.C. § 150 (1976). Agreements became important after the termination of treaty-making powers. Agreements were ratified by both houses of Congress in a similar manner as treaties. *See, e.g.*, Act of Mar. 1, 1901, ch. 675, 31 Stat. 848.

¹⁸² Cohen, *supra* note 170, at 6.

¹⁸³ *Id.* at 3.

when they seek to enforce and preserve their constitutional rights against the states is the Eleventh Amendment.¹⁸⁴ The plenary power of Congress, however, can abrogate the Eleventh Amendment. Congress has abrogated the states' sovereign immunity in the IGRA which was enacted pursuant to the Indian Commerce Clause.¹⁸⁵ Thus, by granting full effect to the IGRA, the rights and privileges of Indian nations recognized in *Worcester v. Georgia* many years ago can finally be acknowledged.

IV. THE PLENARY POWER OF CONGRESS OVER INDIAN AFFAIRS IS EVEN MORE SPECIAL THAN ITS POWER OVER INTERSTATE COMMERCE

Even the later-adopted Fourteenth Amendment has been an incomplete check on the Article I explicit and inherent Indian powers of Congress. The plenary power of Congress to regulate and administer pursuant to the explicit Indian treaty commerce and inherent Indian trust powers is sufficiently great to stand in the face of the later-adopted Fourteenth Amendment checks on federal and state power. In *Morton v. Mancari*,¹⁸⁶ the Court unanimously upheld the Indian Preference Act in the face of a Fourteenth Amendment equal protection challenge.¹⁸⁷ Despite the Amendment's later adoption, the Court took it as established constitutional doctrine that the special duties owed to Indians prevented the Amendment from having any force to overturn congressional policy based on its legitimate role as trustee for the tribes.¹⁸⁸ Isn't it therefore clear that the Eleventh Amendment, also adopted later, cannot be said to contain an implicit repeal of accepted congressional trust power? How is Congress to enforce its scheme under the plenary power if states can resist by challenging jurisdiction?

¹⁸⁴ Indians were not United States citizens until 1924. 8 U.S.C. § 1401(b) (1982).

¹⁸⁵ 25 U.S.C. §§ 2701-2721 (1988 & Supp. IV 1992).

¹⁸⁶ 417 U.S. 535 (1974).

¹⁸⁷ *Morton*, 417 U.S. at 551.

¹⁸⁸ *Id.* at 551-52.

The Eleventh must bow just as the Fourteenth did in *Morton*.

It seems that Congress can be assumed to be aware of the "unmistakably clear" intent to abrogate the immunity rule. After all, it followed the formula in the IGRA. We assume Congress was aware of the Court's upholding of the Indian Preference Act in *Morton* in the face of that case's Fourteenth Amendment challenge. We can further assume that Congress addressed the challenge of accepted doctrine and adopted its statutory formula knowing that the effect would be diminution of state immunity in favor of shared regularity control through the tribal/state compact.

Congress' purpose was to regulate gaming rather than permit it without limitation or bar it absolutely. It recognized the state's interest in two ways—the first in allowing Class III gaming only where it already exists, and the second in making the tribe and state come to agreement as to scope. Where the state refuses both of these entreaties it should be treated as a grant to the Secretary of the Interior of the ultimate authority to determine the scope of gaming. If the state's Eleventh Amendment argument succeeds, the state will gather unto itself the veto power over Indian gaming which was intended to be broken by the IGRA. If Congress has the unquestioned power to permit gaming on any basis it chooses, then why not characterize the state's assertion of Eleventh Amendment immunity as the refusal to deal? The posture should be one of tribal compliance with all steps up to the submission of variant plans to the Secretary of the Interior for his choice over the objection of the state.

In other words, the courts should treat this as an issue of statutory interpretation where the statute appears to require the doing of nugatory or futile acts. Should a state refuse to negotiate, the refusal should be the basis for sending the dispute forward, not dismissed. The courts should issue an order to the effect that the statute has been complied with and the matter is now ripe for decision by the Secretary of the Interior. It is an appropriate order since it is a federal question and one of statutory interpretation. In addition, it would not invoke the critical mass of Eleventh Amendment jurisprudence dealing

with the hailing of states into federal court for monetary judgments. Instead it raises only the injunctive or equitable remedies which have no impact on the state treasury.

V. IGRA IS A CLEAR STATEMENT OF CONGRESSIONAL ABROGATION

Congressional concern and intent in the IGRA to abrogate the state's sovereign immunity is manifested in several ways. First, Congress clearly heeded the admonition of Justice Stevens' dissent in *California v. Cabazon Band of Mission Indians*,¹⁸⁹ in which he criticized the Court for doing what Congress should do in exercising its plenary powers.¹⁹⁰ Recognizing the unsettled disputes over regulation of gaming on Indian reservations, Congress promptly exercised its plenary powers in Indian affairs by enacting the IGRA.

Second, in the IGRA, Congress through the Senate committee report on the Act provides a clear and unequivocal statement of its intent to grant federal court jurisdiction to resolve disputes between the states and tribes through the state-tribe compact process. This is entirely consistent with the "clear statement" principles enunciated in the series of interstate commerce cases cited above.

Third, Congress chose not to impose a federal regulatory scheme on the states' gaming policies and operations but merely to provide "incentives" for the states to negotiate in good faith with the tribes for mutual benefit. Framing the regulatory scheme in terms of "incentives" for the states rather than imposing direct federal regulation indicates not only a close reading of recent Supreme Court rulings but careful attention to the Court's articulated tests for express abrogation of the states' sovereign immunity.

Fourth, it is striking that in the IGRA, Congress waived not only the immunity of states but also tribes. Either entity can sue in federal court to obtain compliance of executed com-

¹⁸⁹ 480 U.S. 202, 227 (1987) (Stevens, J., dissenting).

¹⁹⁰ *Cabazon Band of Mission Indians*, 480 U.S. at 227 (Stevens, J., dissenting).

pacts. Furthermore, Congress authorized the federal government to bring suit against either or both tribes and states if necessary to carry out the provisions of the Act. In the IGRA both state and tribal immunity are abrogated by Congress.¹⁹¹ States are not even required by the IGRA to participate in the regulation of Indian gaming but only to negotiate with tribes in good faith if they wish to do so. Congress has waived immunity of tribes so that states can enforce regulations established in their compacts with tribes, as well as waiving the immunity of tribes to enforce suits by the federal government.¹⁹²

VI. CONGRESSIONAL INTENT SUPPORTS THE ARGUMENT FOR ABROGATION AND AVOIDS THE CONSTITUTIONAL ISSUE

A. Interpretation Before Constitutional Confrontation

It is a familiar principle that federal courts do not pass on the constitutionality of an act of Congress if, by fair construction, the constitutional issue can be avoided.¹⁹³ This principle, founded on prudence, has grown to the status of a rule.¹⁹⁴ Courts should avoid unnecessary constitutional rulings. This has been said to be even stronger where the ruling is one about the relative constitutional authority of the federal branches of government.¹⁹⁵ This seems to encompass prudence in the case of relative constitutional authority of Congress and states. For just as the Court should be reluctant to issue a ruling empowering one branch at the expense of another, it ought to be cautious in empowering one level of government at the expense of the other. This caution is in part found in the notion of reserved state power contained in the Tenth and Eleventh Amendments.

¹⁹¹ For basis of tribal sovereign immunity, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

¹⁹² 25 U.S.C. § 2710(d)(7)(A) (1988).

¹⁹³ *Zobest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2465 (1993).

¹⁹⁴ *Zobest*, 113 S. Ct. at 2466 (referring to principle as "prudential rule"); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) (stating this is "[e]stablished practice").

¹⁹⁵ *American Foreign Serv. Assoc. v. Garfinkel*, 490 U.S. 153, 161 (1989).

It has been said by the Court in the case of *Escambia County v. McMillan*¹⁹⁶ that it is a "principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."¹⁹⁷ This sounds in jurisdiction, but should be considered in the context of this case's issue. *Escambia County* involved a conflict between the Voting Rights Act and a state statute calling for election of some county officials on an at-large basis.¹⁹⁸ Appellate jurisdiction exists only where interpretation of the federal statute affects a state statute.¹⁹⁹ The legitimate issue of jurisdiction rested on the presence or absence of a state/federal conflict rather than the need to address the constitutional issue. Jurisdiction was present were the federal statute to invalidate the state statute even without an issue of constitutional interpretation.

The rule seems to be a compound of jurisprudence principles. Judges should be conscious of their role as final arbiters of constitutional matters. Only their sound and effective judgments prevent mistakes which are determinative.²⁰⁰ These final decisions concern a fundamental government structure, relative power and the extent of personal liberty. Fallibility should suggest to the reflective judge not only deliberation but avoidance.²⁰¹ Where the exercise of this great power can, in proper and faithful fulfillment of the judicial duty be avoided, the power is commensurate with duty. Second, an unnecessary constitutional decision violates other basic constitutional law principles such as avoiding unique controversies and advisory opinions.²⁰²

¹⁹⁶ 466 U.S. 48 (1984) (per curiam).

¹⁹⁷ *Escambia County*, 466 U.S. at 51 (1984).

¹⁹⁸ *Id.* at 50-51.

¹⁹⁹ See 28 U.S.C. § 1254(2) (1988); see also *Escambia County*, 466 U.S. at 52-53 (Marshall, J., dissenting).

²⁰⁰ *Ashwander v. Tennessee Valley Auth.* 297 U.S. 288, 341-42, 345-46 (Brandeis, J., concurring).

²⁰¹ *Ashwander*, 297 U.S. at 345-46 (Brandeis, J., concurring).

²⁰² *Id.* (Brandeis, J., concurring).

This reluctance raises constitutional issues to a level along statutory interpretation. Its soundness may lie in the relative authority of the Congress and Court. Should legislation be interpreted badly, it can be corrected. Should the Constitution be mangled, Congress can only begin the amendment process needed to change the result.

It is so well settled, it has become a rubric.²⁰³ Courts should not address the issue of sovereign immunity if a fair construction of the IGRA will permit them to avoid the issue. It takes only a small leap to bring this rubric to bear on the sovereign immunity issue. Given Congress' plenary power in Article I of the Constitution and that power's prior invocation by Congress to justify the IGRA, courts can look to congressional intent to determine the amount of control the legislature was willing to confer. Should a state choose not to take up the congressional offer of joint authority, the proper response is to declare Congress' intent that the Secretary of the Interior in conjunction with the tribe will determine the extent to which gaming will be allowed.

B. Analogous Case Law

The Supreme Court has not yet stated that the IGRA issues discussed herein are merely matters of federal statutory interpretation and not valid constitutional questions. However, the Court has applied this doctrine in other areas of law where it determined the intent of a federal statute and never reached the constitutional questions raised by the parties. A few examples will illustrate this point.

Two cases which discuss various aspects of takings by the federal government have some significance with respect to the IGRA issues discussed herein. In *Ruckelshaus v. Monsanto Co.*,²⁰⁴ Monsanto, an applicant for registration of a pesticide, sought an injunction to negate the provision of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requiring

²⁰³ United States v. Locke, 471 U.S. 84, 92 (1985).

²⁰⁴ 467 U.S. 986 (1984).

data consideration and disclosure to the Environmental Protection Agency when applying to register a pesticide on the grounds that such provisions constituted an unconstitutional taking of trade secrets and commercial information.²⁰⁵ The district court found that the provisions of FIFRA did not adequately compensate Monsanto for its disclosure of trade secrets, and the court declared those sections of FIFRA unconstitutional because they violated the Fifth Amendment.²⁰⁶ On appeal, the Supreme Court recognized a property right in a trade secret,²⁰⁷ but held that the disclosure required did not constitute a taking.²⁰⁸ The Court noted that a statute exists, specifically Section 3(c)(1)(D)(ii) of the FIFRA,²⁰⁹ which provides just compensation for any potential taking of property in the form of trade secrets.²¹⁰ Therefore, the Court did not reach the Fifth Amendment taking issue.

With respect to the IGRA cases, *Ruckelshaus* bolsters the argument that, where Congress has provided for relief through a statute, the court should defer to Congress' intent and enforce the statute. Clearly, Congress did not intend for tribes to be hamstrung by states refusing to negotiate in good faith. The clear intent of Congress when tribes and states reach an impasse in negotiations is for a tribe to raise its concerns directly with the Secretary of the Interior. Congress did not intend for the tribes to be without recourse when the states invoke their sovereign immunity.

Another takings case, *United States v. Locke*,²¹¹ involved allegations that the extinguishing of mining claims under the Federal Land Policy and Management Act when mining claim owners had failed to follow notification procedures explicitly constituted an unconstitutional taking of property without just compensation.²¹² The Court offered a lengthy discussion of

²⁰⁵ *Ruckelshaus*, 467 U.S. at 990-92.

²⁰⁶ *Id.* at 999-1000.

²⁰⁷ *Id.* at 1003-04.

²⁰⁸ *Id.* at 1012-13.

²⁰⁹ *Id.* at 995 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).

²¹⁰ *Ruckelshaus*, 467 U.S. at 1013.

²¹¹ 471 U.S. 84 (1985).

²¹² *Locke*, 471 U.S. at 91. In that case, petitioners argued that substantial

statutory interpretation which is relevant to the IGRA cases in stating:

Going behind the plain language of a statute in search of a possible contrary, congressional intent is "a step to be taken cautiously, even under the best of circumstances." When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation.²¹³

In applying this language to the IGRA, it could be argued that Congress clearly intended for tribes to be able to overcome sovereign immunity claims by states; otherwise, Congress would have never added the provision allowing tribes to bring their grievances to the Secretary of the Interior once good faith negotiations break down and the tribe has brought suit against the state.²¹⁴

One other case should also be discussed in regard to this question of statutory interpretation versus constitutional issue. In 1977, the Supreme Court was faced with the issue of whether a court could grant additional procedural rights under the Administrative Procedure Act—rights which were not granted by the agency in which Congress had bestowed such rule-making procedural authority.²¹⁵ The dispute in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*²¹⁶

compliance with Section 314 of the Federal Land Policy and Management Act requiring owners of mining claims to file a notice of intention "prior to December 31 of each year" was insufficient when the petitioner failed to file such notice until December 31. *Id.* at 91-92, 93-95.

²¹³ *Id.* at 95-96 (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982)) (citations omitted).

²¹⁴ See text of IGRA and discussion of such provisions herein.

²¹⁵ *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519 (1978). The facts and history of this case, which includes two previous decisions by the Circuit Court of Appeals for the District of Columbia Circuit, are complex and will be summarized only to the extent necessary to relate the significance of the case to this article.

²¹⁶ 435 U.S. 519 (1978).

stemmed from a disagreement over the regulatory powers granted by the Atomic Energy Act of 1954 to the Atomic Energy Commission (AEC),²¹⁷ the Atomic Safety and Licensing Appeal Board (Appeal Board), and the Atomic Safety and Licensing Board (Licensing Board).²¹⁸

The dispute involved the licensing of a nuclear power plant and the AEC's adoption of rulemaking proceedings for a hearing to deal with "the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors."²¹⁹ The AEC's adoption of these proceedings effectively prevented the Licensing Board from utilizing full and formal adjudicatory proceedings in the future.²²⁰ This decision led to the dispute in *Vermont Yankee* when Consumers Power Co. applied for a permit to build two nuclear reactors and, after being denied the permits, petitioned the Licensing Board to reopen its proceedings.²²¹ Consumers argued that the Council for Environmental Quality had revised its regulations concerning the preparation of environmental impact statements, and the environmental impact statements drafted by the AEC and considered by the Licensing Board in reaching its decision were no longer valid under the new regulations.²²² Thus, the environmental impact statements had to be revised for another hearing to reconsider the denial of the nuclear reactor permits.²²³

The AEC declined to reopen the proceedings, and Consumers appealed the decision to the Court of Appeals for the Dis-

²¹⁷ *Vermont Yankee*, 435 U.S. at 527. The licensing and regulatory functions of the AEC were transferred pursuant to the Energy Reorganization Act of 1970 to the Nuclear Regulatory Commission. *Id.* at 527 n.2.

²¹⁸ *Id.* at 525-29.

²¹⁹ *Id.* at 529 (quoting proceedings of Appeal Board).

²²⁰ *Id.* at 530. In justifying its decision to implement such procedures for the hearing, the AEC stated, "The record does not indicate that any evidentiary material would have been received under different procedures." *Id.* at 530 n.7.

²²¹ *Vermont Yankee*, 435 U.S. at 530-31.

²²² *Id.* at 532.

²²³ *Id.*

trict of Columbia Circuit.²²⁴ Despite the AEC's compliance in following all statutorily-required procedures in evaluating Consumers' applications, the court held that the proceedings were inadequate.²²⁵

In delivering the opinion of the United States Supreme Court, Justice Rehnquist initially recognized that the Administrative Procedure Act contains provisions which contain:

[T]he maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them *if the agencies have not chosen to grant them*.²²⁶

This means when Congress grants the right to an agency to dictate the procedural rules and safeguards permissible under a statute, the courts cannot step in and deviate from the steps taken by the agency endowed with such power by Congress. Put another way, courts cannot reinterpret Congressional intent and tailor it to suit their notions of what is procedurally proper. In *Vermont Yankee*, the AEC had the full authority of Congress to establish all procedural rules concerning the licensing of nuclear reactor sites and this authority cannot be curtailed by an appellate court.²²⁷ The same argument might

²²⁴ *Id.* at 533.

²²⁵ *Id.* at 536.

²²⁶ *Vermont Yankee*, 435 U.S. at 524 (emphasis added). As an example of this concept, the Court cited language from *FCC v. Schreiber*, 381 U.S. 279 (1965), where the Court stated:

[The principle developed as] an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

Schreiber, 381 U.S. at 290.

²²⁷ *Vermont Yankee*, 435 U.S. at 543. The Court recognized that the procedural rules could be struck down or modified by an appellate court if legitimate constitutional concerns were raised. *Id.* Without using so many words, the Court has invoked the principle that, if disputes can be resolved through federal statutory interpretation, then they are unless a ripe constitutional question is raised.

be made by analogy to the states' involvement in IGRA cases because the statutes clearly intend for good faith negotiations to occur between the tribes and states. The states cannot unilaterally circumvent Congressional intent by refusing to negotiate, then shroud themselves in sovereign immunity to prevent further action by a tribe.²²⁸

VII. CONCLUSION

Courts have failed to adequately examine and distinguish Eleventh Amendment cases. Differentiating circumstances include express congressional abrogation versus implicit or consensual abrogation of sovereign immunity. Since some cases are brought by individual citizens and others by sovereign Indian tribes, identity of the parties provides another instance. The type of relief sought is also distinguishing since some cases involve claims for monetary damages while others seek injunctive relief. In addition to these factors, courts have now determined that Article I powers cannot be exercised to diminish the Eleventh Amendment since the Amendment came later in time. Finally, and most disturbing, a new, unsupported constitutional premise has emerged. Today, there appears from nowhere a qualitative distinction between the Indian and the Interstate portions of the Commerce Clause. More than 160 years ago the United States Supreme Court recognized the sovereign immunity which Indian tribes enjoy.²²⁹ The time has come to recognize tribal autonomy by giving full effect to Congressional legislation passed under the Indian Commerce Clause, in the same way courts do to other congressional acts which do not involve Indian nations.

²²⁸ See text of IGRA and discussion herein of the legislative intent behind its procedures.

²²⁹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

COMMENTS

THE MISSISSIPPI GAMING COMMISSION: AN ANALYSIS OF THE STRUCTURE, DUTIES AND REGULATORY ROLE OF THE AGENCY IN LIGHT OF THE GROWING MISSISSIPPI GAMING INDUSTRY

I. INTRODUCTION

In 1990, the Mississippi Legislature legalized gambling in Mississippi.¹ The political turmoil surrounding the legalization has spawned numerous social and political controversies.² Though certainly abundant, these issues will not be addressed here. The objective of this comment, rather, is to examine various legal considerations surrounding the regulation and control of the Mississippi gaming industry.³

Enacted in 1990, the Mississippi Gaming Control Act (Mississippi Act)⁴ is the empowering act of the Mississippi Gaming Commission, the administrative body which regulates gaming within Mississippi. This comment will outline the organizational structure of the Mississippi Gaming Commission and explore the source of its statutory authority. Due to its recent creation, reported activity of the Commission is sparse.⁵ Nevertheless, this comment will examine the rule-

¹ 1990 Miss. Laws 573, § 10 (codified at MISS. CODE ANN. § 97-33-7(4) (1994)).

² See, e.g., Margaret Litvin, *Floating Casinos Gambling with the Environment, Mississippi Riverboats Under Fire*, USA TODAY, July 7, 1994, at 8A (noting environmental risks created due to unanticipated growth of industry); Bartholomew Sullivan, *Mafia Probe Targets Gambling Firm that Pursued Mississippi Casinos*, COM. APPEAL (Memphis), July 30, 1994, at 1A (discussing concerns over links of gaming industry to organized crime).

³ All references to casinos and other gambling establishments shall herein be referred to collectively as the "industry," or the "gaming industry," whether or not within the State of Mississippi.

⁴ 1990 Miss. Laws Ex. Sess. 45 (codified at MISS. CODE ANN. §§ 75-76-1 to -313 (1991 & Supp. 1994)).

⁵ The first case which will be reported is currently on the docket of the Mis-

making authority of the Commission, analyze an example of a rule, and explore the legal issues which have arisen. In order to provide an adequate foundation for a meaningful analysis, the issues and topics herein will be reviewed against a backdrop of predecessor gaming control acts and relevant case law found in other states.⁶

II. BACKGROUND AND STRUCTURE OF THE MISSISSIPPI GAMING COMMISSION

A. *Background and Perspective on Mississippi Gaming Regulation*

In order to comprehend the perspective from which the Mississippi Legislature initially viewed the industry, it will be helpful to review the policy set forth in the empowering act. The Mississippi Act begins with focused and restrictive policy findings. Indeed, the Legislature cautioned that "[n]othing in this chapter shall be construed as encouraging the legalization of gambling in this state."⁷ Thus, from its inception the Legislature appears to have cautiously acceded to the legalization of gambling. From this perspective, the Act itself apparently was written to be narrowly interpreted within the confines of express statutory language. Given the potential for corruptive elements to infiltrate the industry,⁸ gaming control acts have

Mississippi Supreme Court. *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n*, No. 94-CC-235 (Miss.); see *infra* notes 108-30 and accompanying text.

⁶ Cf. NEV. REV. STAT. ANN. § 463.010 (Michie 1994); N.J. STAT. ANN. § 5:12-1 (West 1988).

⁷ MISS. CODE ANN. § 75-76-3(1) (1991). This section clearly establishes the narrow scope and purpose of the Act, maintaining that it "shall not be construed to legalize any form of gaming which is prohibited under the Mississippi Constitution or the laws of this state." *Id.* The Act does not deal with other forms of "gambling" such as raffles and charitable bingo games. See MISS. CODE ANN. § 97-33-51(3) (1994) (providing "[a] bingo game or a raffle held pursuant to the provisions of the Charitable Bingo Law shall not be considered a game or gambling game for purposes of Section[s] 75-76-1 *et seq.*").

⁸ MISS. CODE ANN. § 75-76-3(3)(a) (1991). The Mississippi Legislature noted the importance of regulation in order to keep gaming "free from criminal and corruptive elements." *Id.* Nevada also seeks to ensure that there be no involvement by "unsuitable persons." NEV. REV. STAT. ANN. § 463.1405(1) (Michie 1994).

sought from the beginning to statutorily eliminate the possibility of such infiltration. Both the New Jersey and Nevada acts have sought to screen these undesirable elements at the licensing stage.⁹ The maintenance of high public confidence in the integrity of the operation is of utmost importance to the industry's success. Mississippi seeks to accomplish this through strict regulation.¹⁰

Initially, the geographical restrictions placed on legalized gambling represented certain policy goals. The condition that gaming be limited to the navigable waters of counties bordering the Mississippi River¹¹ or in the waters off the southern

Similarly, the New Jersey Act has provisions requiring the investigation of an applicant's "good character, honesty and integrity" for the 10 years preceding involvement. N.J. STAT. ANN. §§ 5:12-84(c), -89(b)(2) (West Supp. 1994). *See generally*, Alvin J. Hicks, *No Longer the Only Game in Town: A Comparison of the Nevada and New Jersey Regulatory Systems of Gaming Control*, 12 SW. U. L. REV. 583, 585-86 (1981) (discussing New Jersey's and Nevada's policy to prevent criminal infiltration); Nelson Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 250-53 (1980) (discussing problems of corruption and efficacy of regulation).

⁹ The Nevada Act compels the Nevada Gaming Control Board to investigate the qualifications of applicants seeking licenses. NEV. REV. STAT. ANN. § 463.1405(1) (Michie 1994). Case law also indicates judicial support for the Board's licensing power. *See, e.g.*, Kraft v. Jacka, 872 F.2d 862, 873 (9th Cir. 1989) (holding state's interest in denying license in order to maintain public confidence is superior to Constitutional challenge under 42 U.S.C. § 1983); Nevada Tax Comm'n v. Mackie, 333 P.2d 985, 987 (Nev. 1959) (holding refusal to renew license not subject to review unless arbitrary or capricious).

The New Jersey Act has likewise set forth qualifications to be met and investigations to be made prior to issuance of a casino license to an applicant. N.J. STAT. ANN. § 5:12-84 (West Supp. 1994). Case law again is supportive of the New Jersey Casino Control Commission's licensing power. *See, e.g.*, Doumani v. Casino Control Comm'n, 614 F. Supp. 1465, 1470-75 (N.J. 1985) (upholding Commission's power to investigate qualifications of casino shareholders due to association with unsuitable person); *In re Application of Tufi*, 442 A.2d 1080, 1085 (N.J. Super. Ct. App. Div. 1982) (upholding denial of license to casino key employee due to his knowing misrepresentation to Commission).

¹⁰ MISS. CODE ANN. § 75-76-3(3)(b) (1991). The Legislature expressly stated that "[p]ublic confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments. . . ." *Id.* (emphasis added).

¹¹ *Id.* § 97-33-7(4)(b). This section forbids gambling except on board a vessel "whenever such vessel is on the Mississippi River or navigable waters within any county bordering the Mississippi River." *Id.*

coast of Mississippi¹² creates significant natural barriers to the development of gaming within the interior of the state. Although the policy behind these stipulations may be viewed politically or morally in several ways, their effect nevertheless circumscribes the potential expansion of the industry.

Other states with legalized gaming have dealt with this concern differently. Nevada has not imposed any geographical restrictions. Rather, free competition among licensees and strict enforcement of rules and regulations ensuring honest gaming have been the only constraints there.¹³ On the other hand, New Jersey has legislatively restricted gaming to Atlantic City,¹⁴ and then only in "approved hotels."¹⁵ Through this

¹² *Id.* § 97-33-7(4)(a). This section forbids gambling except on board a cruise vessel "whenever such vessel is in the waters within the state of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi. . . ." *Id.*

¹³ NEV. REV. STAT. ANN. § 463.0129(1) (Michie 1994). The Act itself acknowledges the importance of the industry to the economy of the State of Nevada. *Id.* Nevada's approximately 1200 gaming licenses are evidence of its laissez-faire policy toward the industry's growth through business competition. Hicks, *supra* note 8, at 588; see also Rose, *supra* note 8, at 268-78 (discussing Nevada's free enterprise approach). The Nevada Supreme Court has upheld the Commission's ability to act within its legislative authority. The court held that certain "rights" asserted by potential licensees were trumped by the higher interests of the Commission. Nevada v. Glusman, 651 P.2d 639, 648 (Nev. 1982), *appeal dismissed*, 459 U.S. 1192 (1983). The court specifically held that to hold certain private rights superior "would substantially frustrate the state's capacity to regulate the gaming industry." Glusman, 651 P.2d at 648. A federal court further assisted the Commission in its duties by conferring upon its members absolute immunity from suit under 42 U.S.C. § 1983 (1976). Rosenthal v. Nevada, 514 F. Supp. 907, 914 (D. Nev. 1981). The court conferred this immunity recognizing that members of the Commission "are charged with the awesome responsibility of regulating the gaming industry in Nevada and keeping undesirable elements out of the gaming industry." Rosenthal, 514 F. Supp. at 914.

¹⁴ N.J. CONST. art. 4, § 7, ¶ 2D (1947 & Supp. 1994). The New Jersey Constitution was amended, authorizing the New Jersey Legislature to legalize gambling specifically "within the boundaries . . . of the city of Atlantic City, county of Atlantic. . . ." *Id.* New Jersey courts have been very restrictive in maintaining strict adherence to the legislatively created boundaries. See, e.g., Van Ness v. Off-Shore Facilities Corp., 443 A.2d 266, 268 (N.J. Super. Ct. App. Div. 1982) (striking down variance because it geographically conflicted with Casino Control Act and with state policy).

¹⁵ N.J. STAT. ANN. § 5:12-27 (West Supp. 1994). A hotel is defined as "[a] single building . . . located within the limits of the city of Atlantic City as said

scheme, the New Jersey Legislature has endeavored to achieve urban redevelopment in certain areas without adversely impacting the rest of the state.¹⁶ Much more akin to Mississippi's purpose, New Jersey's approach has successfully restricted gaming to limited geographical areas, thus allowing the state more opportunity for observation and control. Though the foregoing restrictions facially serve different policies, the New Jersey Legislature doubtlessly proceeded with similar caution as did the Mississippi Legislature when legalizing gaming.¹⁷

B. Origin of the Mississippi Gaming Commission

The Mississippi Gaming Commission was created by the Mississippi Legislature as the governing body charged with implementing the Gaming Control Act.¹⁸ Initially the duties of the Commission were executed by the State Tax Commission.¹⁹ The New Jersey Casino Control Commission similarly

limits were defined as of November 2, 1976, and containing not fewer than [500 sleeping units], each of which shall . . . be at least 325 square feet . . . each containing private bathroom facilities. . . ." *Id.* Through a matrix the New Jersey Act sets the square footage of a hotel's casino room in proportion to the number of guests it can accommodate in "qualified sleeping units." *Id.* § 5:12-83(c). The hotels furthermore must be large enough to accommodate conventions and meetings. *Id.* § 5:12-83(b).

¹⁶ *Id.* § 5:12-1(b)(4). The New Jersey Act states that gambling "has been approved by the citizens of New Jersey as a unique tool of urban redevelopment for Atlantic City [Thus] as an additional element in the hospitality industry of Atlantic City, [gambling] will facilitate the redevelopment of existing blighted areas and the refurbishing and expansion of existing hotel, convention, tourist, and entertainment facilities. . . ." *Id.*; see also Paul Martin Fried, Comment, *Discretionary Authority and Licensing Standards Under the Casino Control Act*, 37 RUTGERS L. REV. 625, 626 (1985) (discussing policy agenda of New Jersey Act); Rose, *supra* note 8, at 278-79 (discussing New Jersey's policy to promote resort industry).

¹⁷ See Fried, *supra* note 16, at 625-26.

¹⁸ MISS. CODE ANN. § 75-76-7(2) (1991). The section provides that "[f]rom and after October 1, 1993, the Mississippi Gaming Commission consisting of three (3) members is hereby created." *Id.*

¹⁹ *Id.* § 75-76-7(1). While this provision temporarily empowered the State Tax Commission to "exercise the powers and perform all duties assigned to the Mississippi Gaming Commission" it stood repealed on October 1, 1993, as per its internal repealer clause. *Id.*

operates in conjunction with another state agency. The New Jersey Casino Control Act (New Jersey Act) provides that the New Jersey Casino Control Commission "is . . . created in *but not of* the Department of the Treasury."²⁰ However, the Mississippi Act explicitly terminated the State Tax Commission's involvement upon the creation of the Mississippi Gaming Commission²¹ and granted it full authority to regulate the industry under the authority of the Mississippi Act. Likewise, the Nevada counterpart, the Nevada Gaming Commission, is also an autonomous agency.²²

C. Structure of the Mississippi Gaming Commission

1. Composition, Terms, and Membership Requirements

The structure and membership requirements of the Mississippi Commission are statutorily established. The Mississippi Act directs that the Commission be composed of three members²³ appointed by the Governor.²⁴ In addition to the consent of the Senate, the Mississippi Code provides that "[p]rior to the nomination, the PEER Committee shall conduct an inquiry into the nominee's background, with particular regard to the nominee's financial stability, integrity and responsibility and his reputation for good character honesty and integrity."²⁵ The requirements of good character, integrity, and financial stability are an effort to insulate this office from potential corruption and susceptibility to criminal influence. The

²⁰ N.J. STAT. ANN. § 5:12-50 (West 1988) (emphasis added). The New Jersey Commission was created when the New Jersey Act became effective in 1977. *Id.*

²¹ MISS. CODE ANN. § 75-76-7(1)-(2) (1991).

²² NEV. REV. STAT. ANN. § 463.022 (Michie 1994). *But see* Dunn v. Nevada Tax Comm'n, 216 P.2d 985, 997 (Nev. 1950) (authorizing state tax commission to exercise regulatory control over gaming industry).

²³ *Id.* § 75-76-7(2).

²⁴ *Id.* § 75-76-9(5). The Governor is empowered to appoint membership to the Commission upon the "advice and consent of the Senate." *Id.*

²⁵ *Id.* The Act also expresses legislative preferences that "the commission be composed of the most qualified persons . . . available, preferably no two (2) of whom shall be of the same profession or major field of industry. . . ." *Id.* § 75-76-7(5).

New Jersey Act contains a similar provision requiring investigations.²⁶ Although both New Jersey and Nevada empower their Governors to appoint membership on the commission, the Nevada Act lacks an express provision requiring the consent of its Senate.²⁷

Furthermore, the Mississippi Act addresses various obligatory qualifications for Commission membership. These are also included in the Nevada and New Jersey Acts.²⁸ Mississippi specifically requires that one member of the Commission reside in a county which has authorized gaming.²⁹ Presumably, this will ensure a representative on the Commission who will respond to issues directly impacting such counties' residents.

The Mississippi Act imposes several additional restrictive criteria. For obvious reasons, all persons involved in the gaming industry are ineligible.³⁰ Furthermore, all members of the Legislature and all persons holding elected positions are ineligible for membership.³¹ Curiously, Mississippi, unlike Nevada

²⁶ Compare N.J. STAT. ANN. § 5:12-52(d) (West 1988) with MISS. CODE ANN. § 75-76-9(5) (1991).

²⁷ Compare NEV. REV. STAT. ANN. § 463.024(1) (Michie 1994) with N.J. STAT. ANN. § 5:12-52(d) (West 1988). However, it is notable that both the New Jersey and the Nevada Acts provide for the removal of a commission member for misconduct or malfeasance. Compare NEV. REV. STAT. ANN. § 463.024(3) (Michie 1994) (empowering governor to remove commissioner) and N.J. STAT. ANN. § 5:12-52(g) (West 1988) (providing removal procedure for commissioner instituted by Attorney General) with MISS. CODE ANN. § 75-76-9 (1991).

²⁸ For a discussion and comparison of Nevada's and New Jersey's pre- and post-employment requirements for membership on their respective commissions, see Hicks, *supra* note 8, at 589-90.

²⁹ MISS. CODE ANN. § 75-76-7(3)(b) (1991). Section 75-76-7(3)(b) requires that "[o]ne member of the commission shall have been a resident for not less than five (5) years of a county in which gaming is authorized at the time of appointment." *Id.* Given the distinct geographical locations of legal gaming facilities, issues before the Commission certainly will provide questions unique to these areas. Membership, therefore, of such a resident will provide an informed judgment perhaps not possible otherwise.

³⁰ *Id.* § 75-76-7(5). Section 75-76-9(8) also deals with the potential problems created by conflicts of interest providing that "[m]embers of the commission shall not have any direct or indirect interest in an undertaking that puts their personal interest in conflict with that of the commission. . . ." *Id.* § 75-76-9(8).

³¹ *Id.* § 75-76-7(4).

and New Jersey, failed to restrict membership on the Commission because of political affiliation.³²

Mirroring the Nevada Act, the Mississippi Act institutes four year staggered terms for membership on the Commission.³³ New Jersey, on the other hand, while establishing the initial structure of the Commission, has left future organization to the discretion of the members.³⁴ In addition to assigning the length of individual terms, both the Mississippi and the New Jersey Acts impose statutory term limitations on their members. Mississippi prohibits service beyond two four year terms.³⁵ New Jersey likewise restricts members to no more than two five year terms.³⁶ One of the three members of the Mississippi Commission serves as chairman,³⁷ appointment being made by the Governor. The chairman serves for the duration of his term until his successor is appointed.³⁸ The Nevada and New Jersey Acts likewise provide for appointment of a chairman by the governor.³⁹

The most notable distinction between the Mississippi Commission and its functional counterparts in Nevada and New Jersey is the exclusivity of the employment. The New

³² NEV. REV. STAT. ANN. § 463.023(4) (Michie 1994) (requiring that no more than three members of Commission be of same political affiliation); N.J. STAT. ANN. § 5:12-51(c) (West 1988) (same).

³³ Compare MISS. CODE ANN. § 75-76-9(2)-(4) (1991) with NEV. REV. STAT. ANN. § 463.024(2) (Michie 1994). Initially, the appointments to the Mississippi Commission were different for each commissioner: one member for two years, another for three years, and the final for four years. MISS. CODE ANN. § 75-76-9(2) (1991). After the initial appointments, however, each member serves a four year term. *Id.* § 75-76-9(4). Presently, the Commission is composed of W. W. Gresham, Jr.; Victor Smith; and Capt. Robert C. Ingram.

³⁴ N.J. STAT. ANN. § 5:12-54(a) (West 1988). The section provides that "[t]he commission may establish, and from time to time alter such plan of organization as it may deem expedient. . . ." *Id.*

³⁵ MISS. CODE ANN. § 75-76-9(4) (1991).

³⁶ N.J. STAT. ANN. § 5:12-52(c) (West 1988).

³⁷ See *supra* note 33 (present chairman is W. W. Gresham, Jr.).

³⁸ MISS. CODE ANN. § 75-76-9(6) (1991). The Mississippi Act places a term limit on this office in addition to requiring that any member who has served as chairman may not serve in that capacity for more than ten years. *Id.*

³⁹ See NEV. REV. STAT. ANN. § 463.024(1) (Michie 1994); N.J. STAT. ANN. § 5:12-52(f) (West 1988).

Jersey Act has expressly mandated that "[a]ll members [of the commission] shall devote full time to their duties of office and shall not pursue or engage in any other business, occupation or other gainful employment."⁴⁰ To guarantee compliance with this mandate and to ensure the selection of qualified members, New Jersey offers a generous compensation to its members.⁴¹ Although offering ample compensation,⁴² the Nevada Act does not preclude other employment.⁴³ The Mississippi Act places far less restrictive requirements on members. It merely requires that regular meetings be held "at such times and places as [the commission] may deem convenient," the only stipulation being that they hold at least one meeting each month.⁴⁴ Since the statutory duties are fairly limited, the Mississippi Act only provides *per diem* compensation to the commissioners.⁴⁵ However, it would appear that the growth of the gaming industry in Mississippi has imposed greater responsibilities on the commissioners than those statutorily required, possibly meriting legislative action increasing the Commission's compensation.⁴⁶

⁴⁰ N.J. STAT. ANN. § 5:12-52(f) (West 1988).

⁴¹ *Id.* § 5:12-53. "Each member of the commission shall receive an annual salary of \$90,000.00. The chairman shall receive \$5,000.00 in addition to his salary as a member of the commission." *Id.*

⁴² NEV. REV. STAT. ANN. § 463.026 (Michie 1994). In Nevada, the chairman receives an annual salary of \$42,000 and the remaining members of the Commission receive \$30,000 annually. *Id.*

⁴³ *Id.* § 463.025(1). The Nevada Act merely requires that "[t]he commission members shall devote such time to the business of the commission as may be necessary to the discharge of their duties." *Id.*

⁴⁴ MISS. CODE ANN. § 75-76-13(2) (1991). The required monthly meetings must be held "on or after the fifteenth day of the month." *Id.*

⁴⁵ *Id.* § 75-76-9(10). "Each member of the commission is entitled to per diem as provided by Section 25-3-69." *Id.* Section 25-3-69 entitles officers and employees of state agencies to receive \$40.00 per day when discharging their official duties. *Id.* § 25-3-69.

⁴⁶ Mississippi is now the second largest casino state calculated by square footage of gaming facilities with 1,162,406 square feet, second only to Nevada with 4,501,129 square feet. Margaret Litvin, *Floating Casinos Gambling with the Environment, Mississippi Riverboats Under Fire*, USA TODAY, July 7, 1994, at 8A. With twenty-eight casinos operating, Mississippi far exceeds New Jersey's 797,155 square feet of gaming area. *Id.*; see *supra* note 15 (discussing New Jersey's restrictive policy regarding casino room square footage).

2. Subdivisions and Regulatory Responsibilities

Although the policy and regulatory decision-making is left to the Commission, the hands-on work required to implement such policy and regulations is carried out by various subdivisions. In order to provide continual executive control over the activities of the agency, the Mississippi Act provides for a non-political substructure. Thus, given the fairly limited statutory requirements imposed on the Commission, the Legislature created the office of Executive Director.⁴⁷ Subject to Senate approval, the Commission appoints the Executive Director, who "serves at the will and pleasure of the commission."⁴⁸ Establishing the position as full time⁴⁹ and salaried,⁵⁰ the Act expresses the Legislature's intent that the position be filled by qualified individuals with extensive management skills.⁵¹

While the Nevada and New Jersey acts provide for similar offices, there are several notable distinctions. The New Jersey Legislature created the office of Executive Secretary. The New Jersey Executive Secretary, a counterpart to Mississippi's Executive Director, is appointed by the New Jersey Commission.⁵² Nevada, however, has established a different form of executive control. A distinct Gaming Control Board⁵³ is authorized to implement and to enforce the policies and regula-

⁴⁷ MISS. CODE ANN. § 75-76-15(2) (1991). The present Executive Director is General Paul A. Harvey.

⁴⁸ *Id.* § 75-76-15(3).

⁴⁹ *Id.* § 75-76-15(6). The Mississippi Act expressly precludes the Executive Director from pursuing any other business or office for profit. *Id.*

⁵⁰ *Id.* § 75-76-15(8). The commission is additionally given the authority to establish the Executive Director's salary. *Id.*

⁵¹ *Id.* § 75-76-15(5). This section requires that the individual appointed have at a minimum of five years management or administrative experience. *Id.*

⁵² N.J. STAT. ANN. § 5:12-54(c) (West 1988). The New Jersey Act also seeks to ensure that the Executive Secretary is qualified, by requiring 5 years of administrative experience. *Id.* The Commission is entitled to elect a vice-chairman to act in place of the appointed chairman in his absence. *Id.* § 5:12-54(b).

⁵³ NEV. REV. STAT. ANN. § 463.030 (Michie 1994). Membership on the Board is a full-time salaried position. *Id.* §§ 463.060(1), 463.070.

tions of the Commission.⁵⁴ Unlike in New Jersey and Mississippi, this three-member board is appointed by the governor who can also⁵⁵ designate one of the members to serve as "chairman and executive director."⁵⁶ In addition, Nevada also has an Executive Secretary⁵⁷ appointed by the Gaming Control Board subject to the Commission's approval.⁵⁸ The extensive structure of the Nevada regulatory scheme perhaps evidences a certain degree of legislative distrust in the industry.

The Mississippi Executive Director is empowered to administer and to enforce all licensing provisions of the Act.⁵⁹ In order to facilitate the Executive Director's duties, the Mississippi Act has created two divisions: the Enforcement Division and the Investigation Division.⁶⁰ The Act also authorizes the Executive Director to create other divisions to effectively implement the Act.⁶¹ The Executive Director can also sue and be sued,⁶² make and enter into contracts,⁶³ and generally

⁵⁴ See *id.* § 463.140.

⁵⁵ *Id.* § 463.050(2).

⁵⁶ *Id.* § 463.050. Each member of the Board serves for a four year term. *Id.* The composition of the Board is limited by qualifications similar to those required for membership on the Commission. Compare NEV. REV. STAT. ANN. § 463.023 (Michie 1994) with NEV. REV. STAT. ANN. § 463.040(1)-(2) (Michie 1994). Additionally, there are several more professional qualifications which must be present among the board members. One must be a certified public accountant with at least five years experience. NEV. REV. STAT. ANN. § 463.040(5) (Michie 1994). Another must be selected for his experience in the fields of "investigation, law enforcement, law, or gaming." *Id.* § 463.040(6).

⁵⁷ NEV. REV. STAT. ANN. § 463.085(1) (Michie 1994).

⁵⁸ *Id.* § 463.085(2). The Executive Secretary "is responsible for the conduct of the commission's administrative matters. . . ." *Id.* § 463.085(2)(b).

⁵⁹ MISS. CODE ANN. § 75-76-27(1) (1991). The Executive Director is obligated to administer licensing provisions "for the protection of the public and in the public interest in accordance with the policy of the state." *Id.*

⁶⁰ *Id.* § 75-76-17(1). These divisions were statutorily created on October 1, 1993. *Id.* The Executive Director also is required to appoint directors for each division who possess "training and experience in the fields of investigation, law enforcement, law or gaming." *Id.* § 75-76-17(2). Presently there are 29 enforcement agents within the Enforcement Division and 17 field investigators in the Investigation Division.

⁶¹ *Id.* § 75-76-17(1).

⁶² *Id.* § 75-76-21(1)(a).

⁶³ *Id.* § 75-76-21(1)(c).

oversee and manage all administrative activities of the Commission.⁶⁴ More specifically, the Executive Director is required to investigate applicants⁶⁵ seeking gaming licenses and to police and enforce rules and regulations.⁶⁶ The Executive Director must recommend the Commission's denial of a license application should he find the applicant unsuitable.⁶⁷ Moreover, for the purpose of investigation and enforcement, the Act gives the Executive Director the powers of a peace officer.⁶⁸

New Jersey and Nevada have comparable organizations to investigate applicants and enforce the rules of the industry. New Jersey's enforcement organization, the Division of Gaming Enforcement, is separate from the Commission.⁶⁹ It is a division of the New Jersey Department of Law and Public Safety.⁷⁰ The director, who is appointed by the governor, is given the status of Assistant Attorney General.⁷¹ Thus, the Division of Gaming Enforcement is operated within and under the control of the Attorney General.⁷² The duties, however,

⁶⁴ MISS. CODE ANN. § 75-76-23 (1991). "The executive director shall direct and supervise all administrative and technical activities of the commission in accordance with the provisions of this chapter and with the administrative procedure of and regulations adopted by the commission." *Id.* It is also the duty of the Executive Director to "[e]stablish, and from time to time alter, such plan of organization as he may deem expedient." *Id.* § 75-76-23(a); *cf. supra* note 58.

⁶⁵ MISS. CODE ANN. § 75-76-29(1) (1991).

⁶⁶ *Id.* § 75-76-27(4).

⁶⁷ *Id.* § 75-76-29(2). Prior to the issuance of a gaming license the Executive Director must investigate the qualifications of each applicant. *Id.* § 75-76-29(1). He is further required to ensure that no other unsuitable or unqualified person is materially involved in gaming. *Id.* The ultimate decision to grant a license is vested in the Commission which possess "full and absolute authority" to deny applications. *Id.* § 75-76-29(3).

⁶⁸ *Id.* § 75-76-27(5). The Executive Director as well as the Commission is given the "power and authority to issue subpoenas and compel the attendance of witnesses at any place within this state. . . ." *Id.* Furthermore any false statement before the Commission is perjury. *Id.*

⁶⁹ N.J. STAT. ANN. § 5:12-55 (West 1988); *see Hicks, supra* note 8 (comparing duties and powers of Nevada and New Jersey Commissions).

⁷⁰ N.J. STAT. ANN. § 5:12-55 (West 1988).

⁷¹ *Id.* § 5:12-55. "The director shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve during the term of office of the Governor. . . ." *Id.*

⁷² *Id.* § 5:12-56(a). The Attorney General is empowered to organize and struc-

are similar to those required of the Executive Director of the Mississippi Gaming Commission.⁷³ The New Jersey Division of Gaming Enforcement is required, among other things, to investigate the qualifications of each applicant⁷⁴ as well as investigate⁷⁵ and prosecute violations⁷⁶ of the New Jersey Act.

Nevada, as above mentioned, established a Gaming Control Board⁷⁷ which performs the investigative and enforcement functions of the Commission. The Board possesses duties similar to those delegated to the Mississippi Executive Director. It is empowered to investigate the qualifications of applicants⁷⁸ and violations of the act for purposes of prosecution.⁷⁹

The structure of these subdivisions, though differing in form, provides an administrative organization through which the policies of the states may be enforced. The Mississippi Executive Director, possessing authority and responsibilities similar to positions or entities found in Nevada and New Jersey, serves functionally to implement the policies of the Mis-

ture the work of the division and allocate staff from the Department of Law and Public Safety to perform such work. *Id.*

⁷³ Compare MISS. CODE ANN. §§ 75-76-23 to -29 (1991) with N.J. STAT. ANN. §§ 5:12-76 to -79 (West Supp. 1994).

⁷⁴ N.J. STAT. ANN. § 5:12-76 (West Supp. 1994).

⁷⁵ *Id.* § 5:12-76(b)(3). The Division of Gaming Enforcement has the authority to inspect and investigate gaming facilities, including the power to seize property and records for such purposes. *Id.* § 5:12-79. The law enforcement agency's power is derived from the Attorney General. *Id.*

⁷⁶ *Id.* § 5:12-76(b)(4). The New Jersey Act additionally provides that "[t]he division shall prosecute all criminal violations of this act except those it may refer to the Division of Criminal Justice." *Id.* § 5:12-77.

⁷⁷ See *supra* notes 53-56 and accompanying text.

⁷⁸ Compare NEV. REV. STAT. ANN. § 463.1405 (Michie 1994) with MISS. CODE ANN. § 75-76-29 (1991). Sections 75-76-29(1) to -29(3) are identical to language contained in § 463:1405. See Claudia K. Cormier & Robert D. Faiss, *The International Effect of the Nevada Gaming Control Act*, 16 SW. U. L. REV. 437, 441 (1986) (discussing Board recommendations to Commission concerning application of foreign company for license).

⁷⁹ Compare NEV. REV. STAT. ANN. § 463.140 (Michie 1994) with MISS. CODE ANN. § 75-76-27 (1991). The only difference is that the Mississippi Act vests the power solely in the Executive Director whereas the Nevada Act requires that the "board and the commission" perform such duties. Compare NEV. REV. STAT. ANN. § 463.140(1) (Michie 1994) with MISS. CODE ANN. § 75-76-27(1) (1991).

Mississippi Act.⁸⁰

III. ADMINISTRATIVE AUTHORITY AND REGULATION

Although the administration and implementation of policies and regulations under the Mississippi Act are performed by the Executive Director,⁸¹ the Mississippi Gaming Commission is responsible for the actual enactment of policies and regulations.

A. Mississippi Gaming Commission's Policy-Making Role

The Act provides several areas of Commission responsibility. The Commission is responsible for maintaining public confidence⁸² in the gaming industry as well as protecting the public's welfare.⁸³ In addition, the Commission is granted the "absolute power and authority" to issue and revoke licenses. Although the Executive Director investigates each applicant's background, the final decision rests with the Commission.⁸⁴ The Nevada Act likewise specifically delegates the final licensing decisions to the Nevada Commission.⁸⁵ The

⁸⁰ See MISS. CODE ANN. § 75-76-3(3) (1991) (setting forth policies of State of Mississippi).

⁸¹ See *supra* notes 59-68 and accompanying text.

⁸² MISS. CODE ANN. § 75-76-3(3)(b) (1991).

⁸³ *Id.* § 75-76-3(3)(c).

⁸⁴ *Id.* § 75-76-29(3). "The commission has *full and absolute power and authority* to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for *any* cause deemed reasonable by the commission." *Id.* (emphasis added).

⁸⁵ Compare MISS. CODE ANN. § 75-76-29(3) (1991) with NEV. REV. STAT. ANN. § 463.1405(3) (Michie 1994) (stating Commission possesses full authority to deny, limit, revoke or suspend license for any reasonable cause) and NEV. REV. STAT. ANN. § 463.220(7) (Michie 1994) (stating Commission possesses full authority to deny application for any reasonable cause).

Providing judicial support of the Nevada Commission's licensing power, the Nevada Supreme Court restricted the role of the courts in favor of the Commission. The state's high court recognized that "it is not the province of the courts to decide what shall be a reasonable cause for revocation of license [sic]; that such determination is an administrative one to be made by the commission in the exercise of its judgement based upon its specialized experience and knowledge." *Nevada Tax Comm'n v. Mackie*, 333 P.2d 985, 986 (Nev. 1959) (construing Neva-

New Jersey Act similarly requires that the Commission "assure" that no license be issued to an unqualified person, and in so doing delegates to the commission the authority to deny applications.⁸⁶

The Mississippi Commission is also responsible for the adoption of policies which directly impact on the atmosphere of individual gaming facilities. The regulation of gaming school activity is delegated to the Commission,⁸⁷ effectively ensuring the quality and integrity of the gaming employees' performances.⁸⁸ The Commission is furthermore required to establish guidelines authorizing ejections of undesirable persons from gaming establishments.⁸⁹ Nevada likewise empowers its Commission to exclude certain persons from gaming establishments.⁹⁰ Thus, though the actual administration of these policies is effectuated by subdivisions, the Commission is vested with the statutory authority to control and implement the legislatively established policies.⁹¹

da Tax Comm'n v. Hicks, 310 P.2d 852 (Nev. 1957)). The court refused to confer any administrative power on the judiciary, restricting the role of the courts to simply reviewing whether the Commission's decision was arbitrary or capricious. *Mackie*, 333 P.2d at 987.

⁸⁶ See Fried, *supra* note 16, at 651-55 (discussing effectiveness of suitability investigations within New Jersey system). Compare MISS. CODE ANN. § 75-76-29(3) (1991) with N.J. STAT. ANN. § 5:12-64 (West 1988).

⁸⁷ MISS. CODE ANN. § 75-76-34(1) (1991).

⁸⁸ *Id.* § 75-76-34(2). The Commission is empowered to adopt regulations which not only screen those applying for training but also establishes the curriculum taught. *Id.* § 75-76-34(2)(a)-(k); see Hicks, *supra* note 8, at 616-17 (discussing New Jersey's and Nevada's regulation over conduct of games).

⁸⁹ MISS. CODE ANN. § 75-76-35 (1991). The Mississippi Commission is required to effectuate the State's policy of public confidence in the industry by establishing a list of persons to be excluded from gaming establishments. *Id.* § 75-76-35(2). This list is compiled through an evaluation of individuals who have been convicted of felonies, other crimes involving moral turpitude, or have violated gaming laws. *Id.* § 75-76-35(3).

⁹⁰ See *Spilotro v. Nevada Gaming Comm'n*, 661 P.2d 467, 469-70 (Nev. 1983). Compare NEV. REV. STAT. ANN. § 463.151 (Michie 1994) with MISS. CODE ANN. § 75-76-35 (1991).

⁹¹ Nevada has created a separate gaming policy committee. NEV. REV. STAT. ANN. § 463.021 (Michie 1994). This 10 member committee, whose chairman is the governor, holds meetings concerning the state's gaming policies. *Id.* § 463.021(5). Though this committee may make recommendations to the Commission, they are

B. Mississippi Gaming Commission's Regulatory Authority

In addition to vesting the Mississippi Gaming Commission with policy-making authority, the Mississippi Act also empowers the Commission with clearly defined regulatory authority. The Commission as a state agency⁹² is compelled to adopt rules governing the proceedings of its administrative duties. Indeed, the Mississippi Administrative Procedures Law⁹³ expressly orders agencies to adopt rules establishing procedures for license applicants.⁹⁴ The Mississippi Gaming Control Act itself extends the power to the Commission to adopt regulations necessary to carry out the purposes of the Act.⁹⁵ While the New Jersey Act expressly charges the Commission with the responsibility of adopting such rules,⁹⁶ the Nevada Act merely allows the Commission to adopt regulations consistent with its policy findings.⁹⁷

While granting the Commission much discretion, the Mississippi Act sets forth specific areas in which the Commission must adopt regulations.⁹⁸ The language contained in this section of the Mississippi Act is identical to language found in the New Jersey Act.⁹⁹ These required regulations include the

merely advisory and not binding. *Id.*

⁹² MISS. CODE ANN. § 25-43-3(a) (1991). "Agency" means each state board, commission . . . other than the legislature and the courts, authorized by law to make rules or to determine contested cases." *Id.*

⁹³ *Id.* §§ 25-43-1 to -19.

⁹⁴ *Id.* § 25-43-5(2). Each agency is compelled to adopt rules which govern their organizational structure as well as rules which specifically set forth license requirements. *Id.*

⁹⁵ *Id.* § 75-76-33(1). "The commission shall, from time to time, adopt, amend, or repeal such regulations, consistent with the policy, objects and purposes of this chapter, as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this chapter." *Id.*

⁹⁶ N.J. STAT. ANN. § 5:12-63(b) (West Supp. 1994). The Commission is empowered to "promulgate such regulations as in its judgement may be necessary to fulfill the policies of this act." *Id.* The New Jersey Act reiterates this same power in a later section. *Id.* § 5:12-69(a).

⁹⁷ See NEV. REV. STAT. ANN. § 463.0129 (Michie 1994) (defining state policies regarding gaming).

⁹⁸ See MISS. CODE ANN. § 75-76-33(2) (1991).

⁹⁹ Compare N.J. STAT. ANN. § 5:12-70 (West Supp. 1994) with MISS. CODE

methods and procedures by which to obtain a license,¹⁰⁰ the necessary background information required for each applicant and his employees,¹⁰¹ the procedures for hearings before the commission,¹⁰² and the conditions which may subject a license to revocation.¹⁰³ Though this is not an exhaustive list of required regulations, it fairly represents the scope of control delegated to the Commission. As discussed previously, the enforcement of these regulations is performed by the Executive Director through the appropriate subdivisions.¹⁰⁴

IV. JUDICIAL CHALLENGES TO THE COMMISSION'S AUTHORITY

A. *Judicial Review of Administrative Decisions*

The Mississippi Act specifically provides for a system of judicial review whereby a person aggrieved by a decision of the Commission may seek redress. In order to obtain such review, the Commission must have reached a final decision on the matter.¹⁰⁵ A person thus situated may then appeal to the

ANN. § 75-76-33(2) (1991).

¹⁰⁰ MISS. CODE ANN. § 75-76-33(2)(a) (1991). The regulations must set forth the method and form of procedures necessary for license consideration. *Id.*

¹⁰¹ *Id.* § 75-76-33(2)(b). The section instructs the Commission to require information regarding the applicants "antecedents, habits, character, associates, criminal record, business activities and financial affairs, past or present." *Id.* The Act moreover requires information relating to the employees of the applicant. *Id.* § 75-76-33(2)(c). The Act provides that the Commission may in fact require any person "who furnishes services or property to a gaming licensee" to apply for a license as well. *Id.* § 75-76-63(1); see Hicks, *supra* note 8, at 599-604 (comparing Nevada's and New Jersey's licensing requirements).

¹⁰² MISS. CODE ANN. § 75-76-33(2)(e) (1991). Although the Commission is given discretion to establish the manner in which it conducts investigative hearings, the Act delineates specific rules for all other hearings before a hearing examiner. *Id.* § 75-76-111(1). In these hearings, a judicial pattern is followed. Initially oral testimony may be given only under oath. *Id.* § 75-76-111(1)(a). Furthermore, every party may call and examine witnesses, introduce evidence, cross examine opposing witnesses, impeach witnesses and offer rebuttal evidence. *Id.* § 75-76-111(b)(i)-(v). This section of the Mississippi Act contains language virtually identical to a parallel section in the Nevada Act. Compare MISS. CODE ANN. § 75-76-111 (1991) with NEV. REV. STAT. ANN. § 463.313 (Michie 1994).

¹⁰³ MISS. CODE ANN. § 75-76-33(2)(h) (1991).

¹⁰⁴ See *supra* notes 59-68 and accompanying text.

¹⁰⁵ MISS. CODE ANN. § 75-76-121(1) (1991).

Circuit Court in the county where he resides.¹⁰⁶ If a party is dissatisfied with the decision in of the circuit court, he may appeal to the Mississippi Supreme Court, following the method of appeal utilized in civil cases.¹⁰⁷

B. Treatment of Commission Action on Review

As initially alluded to in the first section of this paper, reported activity of the Commission is sparse. As of yet, there has not been a single reported case from the Mississippi Supreme Court concerning the scope and deference to be given to Commission action. There is, however, a case on the docket of the court which will soon determine some of these issues. *Mississippi Casino Operators Ass'n v. Mississippi Gaming Commission*¹⁰⁸ is a case in which an association of casino operators challenged the Commission's interpretation of its own regulations.¹⁰⁹ The regulation being challenged provides a codification of the areas in which casinos may locate.¹¹⁰

¹⁰⁶ *Id.* § 75-76-121(1). The appeal is conducted in the county where the person has his principal place of business. *Id.* Within the Act, a "[p]erson" includes any association, corporation, firm, partnership, trust or other form of business as well as a natural person." *Id.* § 75-76-5(aa).

¹⁰⁷ *Id.* § 75-76-127(1). This section specifically provides:

Any party aggrieved by the final decision in the circuit court after a review of the decision and order of the commission may appeal to the Supreme Court in the manner and within the time provided by law for appeals in civil cases. The Supreme Court shall follow the same procedure thereafter as in appeals in civil actions and may affirm, reverse or modify the decision as the record and law warrant.

Id. See generally MISS. RULES OF APPELLATE PROCEDURE (providing rules and procedure for appeals in civil cases).

¹⁰⁸ *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n*, No. 94-CC-235 (Miss.).

¹⁰⁹ The challenge directly questioned the Commission's power (through its own regulations) to approve a site upon which a casino may operate. For an analysis of current jurisprudence regarding similar siting issues, see Ben H. Stone et al., *Site Approval of Casinos in Mississippi—A Matter of Statutory Construction, or a Roll of the Dice?*, 64 MISS. L.J. 363 (1995).

¹¹⁰ Miss. Gaming Comm'n. Reg. No. 2. (1990). The regulation specifically provides that cruise vessels (gaming on the Mississippi Gulf Coast) may operate in:

Waters within the State of Mississippi which lie adjacent to the three (3) most southern counties of the State. In addition to the Mississippi

Though the regulation was adopted by the Commission under the authority of the Mississippi Act,¹¹¹ the Casino Operators Association challenged the regulation on the grounds that it conflicted with other statutes proscribing geographical limitations on licensed gaming.¹¹² Thus, a question remains to be resolved: Whether the Commission will be accorded deference in its determination?

The deference given to agency decisions is critical to the agency's effectiveness. Mississippi case law has held that judicial review of agency decisions is limited in scope. In *Loftin v. George County Board of Education*¹¹³ the Mississippi Supreme Court held that a reviewing court may determine whether the agency exceeded its power,¹¹⁴ but in *Mississippi*

Sound, this would include St. Louis Bay, Biloxi Bay and Pascagoula Bay. However, rivers and bayous . . . are not within the authorized area. In determining where the river ends and the bay begins, an imaginary line shall be drawn from the foremost land mass at the intersection of the river and bay, straight across the river to the foremost land mass of the intersection on the other side.

Id.

¹¹¹ MISS. CODE ANN. § 75-76-33(2)(j) (1991). The section expressly requires the Commission to establish regulations "defining and limiting the area, games and devices permitted, and the method of operation of such games and devices, for the purposes of this chapter." *Id.*

¹¹² Although silent with regard to artificial, man-made inlets, the regulation does not specifically proscribe authorization of gaming on such sites. The Commission had granted such authorization which is the source of this litigation. The Casino Operators contend that such authorization is beyond the power of the Commission since it is in conflict with the statutorily defined geographical boundaries. MISS. CODE ANN. § 97-33-7(4)(a) (1991). This section outlaws gambling except when on board a cruise vessel "whenever such vessel is in the waters within the state of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi. . . ." *Id.* (emphasis added). The source of contention is that due to construction of a man-made inlet, the casino would no longer be located south of the three most southern counties.

¹¹³ 183 So. 2d 621 (Miss. 1966).

¹¹⁴ *Loftin*, 183 So. 2d at 623. The reviewing court is authorized merely to determine "whether the order (1) was supported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the [agency] to make; or (4) violated some statutory or constitutional right of the complaining party." *Id.* (emphasis added).

State Tax Commission v. Miss.-Ala. State Fair,¹¹⁵ it cautioned against judicial legislation in violation of the Mississippi Constitution.¹¹⁶ The Mississippi Act established that the reviewing court may not conduct a trial de novo,¹¹⁷ but it does allow the reviewing court to determine whether the agency exceeded its express statutory authority.¹¹⁸ Given the breadth of the Commission's rule-making power,¹¹⁹ it appears difficult to conclude that it exceeded its authority. Indeed the Mississippi Supreme Court has held in *Melody Manor Convalescent Center v. Mississippi Department of Health*¹²⁰ that "[g]reat deference is accorded to an administrative agency's construction of its own rules and regulations and the statute under which it operates."¹²¹

In both Nevada and New Jersey, decisions and actions of the respective Commissions are likewise accorded certain deference. Nevada courts have consistently averred to the authority of the Commission. In 1957 the Nevada Supreme Court in *Nevada Tax Commission v. Hicks*¹²² held that reviewing courts could not enter into an evaluation of the Commission's decision.¹²³ Specifically, the court therein held

¹¹⁵ 222 So. 2d 664 (Miss.), cert. denied, 396 U.S. 940 (1969).

¹¹⁶ *Miss.-Ala. State Fair*, 222 So. 2d at 665. The court held that the Mississippi Constitution prohibits a de novo trial of agency decisions on appeal. *Id.* The *Loftin* court held that such review would be in violation of constitutionally established separation of powers. *Loftin*, 183 So. 2d at 623.

¹¹⁷ MISS. CODE ANN. § 75-76-125(2) (1991).

¹¹⁸ *Id.* § 75-76-125(3)(b). This section provides that the court has authority to review if substantial rights of the petitioner are affected. *Id.* § 75-76-125(3). The scope of review however is limited to whether the agency violated constitutional provisions, exceeded statutory authority, followed an unlawful procedure, made the decision without substantial supporting evidence, or made the decision in an arbitrary or capricious manner. *Id.*

¹¹⁹ *Id.* § 75-76-33(1). The Commission may adopt regulations it deems "necessary or desirable" provided they are consistent with the purpose of the Act. *Id.*

¹²⁰ 546 So. 2d 972 (Miss. 1989).

¹²¹ *Melody Manor*, 546 So. 2d at 974 (emphasis added).

¹²² 310 P.2d 852 (Nev. 1957).

¹²³ *Hicks*, 310 P.2d at 855. In 1959, the Nevada Supreme Court again upheld this same principle stating that the court's only role involved the review of agency decisions. *Mackie*, 333 P.2d at 986-87. Conversely, the court has declined to create an administrative remedy where no legal one existed. See *Nevada Gaming*

that it would not review "an administrative determination to be made by the Commission in the exercise of its judgement based upon its specialized experience and knowledge."¹²⁴ In 1977 the Nevada Supreme Court reaffirmed this position regarding review of the Gaming Commission's decisions in *Nevada Gaming Commission v. Rosenthal*.¹²⁵

New Jersey has likewise accorded much deference to administrative decisions of its gaming commission. With regard to the Commission's expertise, the New Jersey Superior Court specifically held in *Application of Boardwalk Regency Corporation for a Casino License*¹²⁶ that deference need not be accorded to legal interpretation. Deference to expertise, the court held was only "as compelling as is the expertise of the agency."¹²⁷ Nevertheless, in *Matter of Adoption of Rules Regarding Property Disposition of a Casino Licensee*,¹²⁸ the New Jersey Superior Court held that an "agency's exercise of authority is entitled to a presumption of validity, and should not be invalidated unless it plainly transgresses the statute."¹²⁹

Control Bd. v. Breen, 661 P.2d 1309, 1311 (Nev. 1983) (holding that aggrieved patron held no property interest in unpaid gambling debt, and thus asserted no basis for judicial review).

¹²⁴ *Hicks*, 310 P.2d at 855.

¹²⁵ 559 P.2d 830 (Nev.), *appeal dismissed*, 434 U.S. 803 (1977). The Nevada Supreme Court continues to approve of this same deferential standard of review. *See, e.g., Resnick v. Nevada Gaming Comm'n*, 752 P.2d 229, 231 (Nev. 1988). Federal review of such decisions likewise is accorded deference. The Ninth Circuit has held that it would not hear a case which was precluded by the Nevada Gaming Control Act. *Erickson v. Desert Palace, Inc.*, 942 F.2d 694, 697 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1476 (1992). Following a state court ruling on an appeal from the Nevada Gaming Commission, the district court ruled that *res judicata* would operate, and thus, precluded any "federal constitutional claim whether it was asserted in state court or not." *Rosenthal v. Nevada*, 514 F. Supp. 907, 912 (D. Nev. 1981).

¹²⁶ 434 A.2d 1111 (N.J. Super. Ct. App. Div. 1981).

¹²⁷ *Application*, 434 A.2d at 1116.

¹²⁸ 540 A.2d 523 (N.J. Super. Ct. App. Div. 1988).

¹²⁹ *Adoption of Rules*, 540 A.2d at 525 (citations omitted). The Supreme Court of New Jersey has staunchly held to the letter of the law when interpreting whether the Commission has run afoul of the Act. The court has held that the regulations adopted by the Commission are the sole guidelines for gaming regulation. *See Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 376 (N.J. 1982) (holding that "absent a valid Commission regulation excluding [certain conduct] . . . [a

Thus, though New Jersey appears to confer more power to reviewing courts than does Nevada, actions and rules adopted by the New Jersey commission will accordingly be given greater weight.¹³⁰

V. CONCLUSION

Given the nature of the Industry and the proclivities of some of those involved,¹³¹ continued regulation becomes an apparent necessity to the prosperity of crime-free and economically successful gaming. In order to effectuate the needed regulation, the Gaming Commission along with its various divisions is faced with an enormous burden. The structure of the entire Commission and its organization, smaller in size than those in Nevada and New Jersey, though initially adequate, has not matched strides with the growth of the Industry. In a short four years since its legalization, the Mississippi Gaming Industry has surpassed New Jersey and is now only second to Nevada in gaming area.¹³² It appears that the Commission's policy-making role, although a necessary aspect of its duties, must now become secondary to the increasing need for effective regulation. To facilitate this, the Mississippi Legislature could perhaps alter some of the aspects of the Commissioners' positions. For example, providing Commissioners with a meaningful salary would possibly enable them to devote more time to their office which is not possible while receiving a mere forty dollar per day stipend.¹³³

In addition to the need to enhance the role of the Commission, another aspect of their regulatory function needs attention. As discussed in section IV of this comment, the

patron] will be free to [exercise that conduct]" despite gaming establishment's efforts to preclude such conduct).

¹³⁰ *Uston*, 445 A.2d at 376. Even when there is no express statutory authorization in the organic statute, the Commission's actions will be upheld provided they are in accordance with policies of the act. *Id.*

¹³¹ Lee Ragland, *Gaming Official Arrested For Cheating*, CLARION-LEDGER (Jackson, Miss.), November 30, 1994, at 1A (discussing arrest of casino manager).

¹³² See *supra* note 46 and accompanying text.

¹³³ See *supra* note 45 and accompanying text.

deference accorded to agency decisions is critical to its effectiveness. Although an unfettered regulatory power would not be desirable, due deference by the courts of this state could certainly enhance and strengthen the Commission. Thus, given the rapid growth of the Industry, such strength and effectiveness is needed to meet the present exigencies.

David F. Maron

**DOCKSIDE GAMBLING AND THE FEDERAL MARITIME LIEN
ACT: WHY DOCKSIDE CASINOS SHOULD NOT BE DEEMED
VESSELS FOR PURPOSES OF THE
FEDERAL MARITIME LIEN ACT**

I. INTRODUCTION

The Federal Maritime Lien Act allows any "person providing necessities to a *vessel* on the order of the owner or a person authorized by the owner" to obtain a maritime lien.¹ One of the many legal issues which have emerged since the legalization of dockside gambling² is whether dockside casinos constitute vessels for the purpose of the Federal Maritime Lien Act. Because a lien against a casino provides significant insurance against non-payment for "necessaries",³ affected creditors will argue that these enterprises are vessels under

¹ 46 U.S.C.A. § 31342 (West 1994) (emphasis added). The statutory language of § 31342 reads as follows:

(a) Except as provided in subsection (b) of this section, a person providing necessities to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;
(2) may bring a civil action in rem to enforce the lien; and
(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

Id.; see W. Bradford Hill, Jr., Comment, *The Federal Maritime Lien Act: A Review and a Prospectus*, 20 HOUS. L. REV. 861, 863 (1983) (quoting G. PRICE, *THE LAW OF MARITIME LIENS* 1 (3d ed. 1940) (defining maritime liens as "privileged claim[s], upon maritime property, for service done to it or injury caused by it, accruing from the moment when the claim attaches, travelling with the property unconditionally, and enforced by means of an action *in rem*")).

² MISS. CODE ANN. § 97-33-1(b) (1994).

³ 46 U.S.C.A. § 31301 (West 1994). "[N]ecessaries' include repairs, supplies, towage, and the use of a dry dock or marine railway." *Id.* See generally Margaret M. Braun, Comment, *Meaning and Construction of "Furnishing" and "Necessaries" Under the Federal Maritime Lien Act*, 12 TUL. MAR. L.J. 337 (1988) (discussing meaning of word "necessaries" under Federal Maritime Lien Act).

the Act. This comment, however, will attempt to explain why dockside casinos should not be considered vessels for purposes of the Federal Maritime Lien Act.

II. JUDICIAL INTERPRETATION OF WHAT CONSTITUTES A VESSEL FOR PURPOSES OF THE FEDERAL MARITIME LIEN ACT

The recent emergence of dockside gambling coupled with the atypical structures housing dockside casinos will undoubtedly pose significant legal questions about the "vessel" status of dockside casinos. It is important to determine whether a floating structure is a "vessel" because of the vital role the definition of "vessel" plays in determining the existence of not only federal jurisdiction, but federal maritime liens as well. In determining whether a floating structure constitutes a vessel for purposes of the Maritime Lien Act, courts have consistently employed the definition of "vessel" as set forth in 1 U.S.C. § 3, which states that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."⁴ In order to readily ascertain whether a maritime lien attaches to a "vessel," the courts will need to develop a workable and consistent interpretation of that term for purposes of the Federal Maritime Lien Act. However, as the case analysis discussed below illustrates, the unique addition of dockside casinos will only add to the uncertainty.

A. "Practically" Capable of Being Used in Navigation

One of the earliest decisions to address the definition of a vessel for purposes of admiralty jurisdiction was the case of *Cope v. Vallette Dry Dock Co.*⁵ The structure in question was

⁴ 1 U.S.C. § 3 (1988); see *Harbour Lights Marina, Inc. v. Wandstrat*, 146 B.R. 963, 970 (Bankr. S.D. Ohio 1992), *aff'd*, 153 B.R. 781 (S.D. Ohio 1993) (applying definition of vessel under 1 U.S.C. § 3); *The Showboat*, 47 F.2d 286, 286 (D. Mass. 1930) (applying 1 U.S.C. § 3 for purposes of determining vessel status); *The Ark*, 17 F.2d 446, 447 (S.D. Fla. 1926) (applying definition of vessel currently found in 1 U.S.C. § 3).

⁵ 119 U.S. 625, 627 (1887).

a floating dry-dock which nearly sunk when a steam-ship rammed her side.⁶ Due to quick relief provided by the libelants, the ship was salvaged.⁷ In order to recover for their services, the libelants filed a libel for salvage.⁸ The sole issue addressed by the United States Supreme Court concerned the dry-dock's status as a vessel for purposes of maritime law.⁹ In concluding that the dry-dock was not a vessel subject to salvage, the Court specifically noted that the dry-dock was "not designed for navigation, and could not be practically used therefor."¹⁰ Thus, before the turn of the century, the Court focused on the intended use of a structure and whether such structure should be "practically" used in navigation in determining a vessel's status of a floating structure for purposes of maritime law. This same line of reasoning was also later applied in *The Robert W. Parsons*.¹¹

In *The Robert W. Parsons*, the United States Supreme Court was called upon to review a judgment of the New York Supreme Court enforcing a lien for repairs to a canal boat that

⁶ *Cope*, 119 U.S. at 625, 626. The sole purpose of a dry-dock is to take ships needing repairs out of the water. *Id.* at 627. The dry-dock "consisted of a large oblong box, with a flat bottom and perpendicular sides." *Id.* In order to take the ship out of the water, the dry-dock was "sunk by letting in water until the vessel to be docked could be floated into it." *Id.* By pumping the water out, the dry-dock was raised in order to facilitate the inspection and repair of the docked vessel. *Id.*

⁷ *Id.* The force of the collision created a large hole in the dry-dock's side. *Id.* Because the location of the hole was below the dry-dock's water-line, the dry-dock began to fill with water. *Id.* To prevent the ship from sinking, the libelants used their suction pumps to pump out the water with which the dry-dock was being filled. *Id.* Without the efforts of the libelants, the dry-dock would have been lost. *Id.* The libelants claimed that they were owed a reward of at least no less than \$5,000. *Id.* When the owners of the dry-dock failed to pay, the libelants filed a complaint to recover salvage for saving the dry-dock. *Id.*

⁸ *Id.* at 625-26.

⁹ *Id.* at 627. The dry-dock's status as a vessel was a requirement of the federal court's jurisdiction. *Id.* If the dry-dock was deemed a vessel, it was a maritime matter subject to federal jurisdiction. *Id.* The circuit court determined that the dry-dock was not a vessel subject to federal court jurisdiction. *Id.*

¹⁰ *Id.* The Court also noted that the dry-dock had "no means of progression." *Id.* at 629. That it floated, the Court added, did not "make it a ship." *Id.* at 627.

¹¹ 191 U.S. 17, 30 (1903).

navigated the Erie Canal and Hudson River.¹² The purpose of the Court's review was to determine whether an action in rem to enforce a lien for repairs to a vessel was within the exclusive admiralty jurisdiction of the federal courts.¹³ The "crucial question" in determining jurisdiction was whether the canal boats engaged in navigating the Erie Canal and Hudson River, which were drawn by horses while in the canal and towed by steamers when utilized in the river, were vessels within the meaning of maritime law.¹⁴ In making this determination, the Court stated that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged."¹⁵ Thus, the Court's classification of the canal boats as vessels for purposes of maritime law was based on their business usage in commerce and navigation.¹⁶

Following *The Robert W. Parsons* decision, the Supreme Court next addressed the vessel status of a docked wharfboat used to transfer freight between steamboats and the shore.¹⁷ Although the dispute involved the limitation of the owner's liability, the Court nevertheless relied on the definition of a vessel as set forth in 1 U.S.C. § 3.¹⁸ The Court, after consid-

¹² *The Robert W. Parsons*, 191 U.S. at 17, 18.

¹³ *Id.*

¹⁴ *Id.* at 28-29, 31.

¹⁵ *Id.* at 30.

¹⁶ *Id.* at 31.

¹⁷ *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926). The wharfboat in question was built in 1882 and initially used on the Mississippi River at Hopefield, Arkansas. *Evansville*, 271 U.S. at 20. From there, the wharfboat was towed to various locations for repairs and usage. *Id.* When the appellant acquired the wharfboat in 1915, the wharfboat was situated in Evansville, Indiana. *Id.* at 19. "While in use at Evansville it was secured to the shore by four or five cables and remained at the same point except when moved to conform to the stage of the river." *Id.* at 21. The wharfboat was atypical in that it was neither self-propelled nor subject to government inspection. *Id.* Telephone, plumbing and electricity on the wharfboat were connected to the city's system. *Id.* A gangway connected the wharfboat with the land in order to permit freight transfer between the wharfboat and the land. *Id.*

¹⁸ *Evansville*, 271 U.S. at 20. The appellant filed a petition in admiralty, seeking to limit his liability for damages caused to the appellee's merchandise

ering evidence of the wharfboat's permanent attachment to the shore and finding that the wharfboat was not "practically capable of being used as a means of transportation," held that the wharfboat did not constitute a vessel within the purview of the limited liability statute.¹⁹ The Court then noted that the wharfboat "performed no function that might not have been performed as well by an appropriate structure on the land."²⁰ The dominant theme embodied in the aforementioned United States Supreme Court decisions is that a floating structure will not be deemed a vessel for purposes of maritime law unless the structure was designed and can be practically used for navigational purposes. A similar rationale has been applied by several other courts in determining the status of a vessel for purposes of the Maritime Lien Act.

In *Hayford v. Doussony*,²¹ a case involving a floating structure with characteristics similar to those possessed by a majority of dockside casinos, the Fifth Circuit concluded that a ship permanently moored to the land and used entirely for entertainment purposes was not a vessel subject to a maritime lien because the "[s]hip was not used, or intended to be used, to carry freight or passengers from one place to another."²² The court reasoned that since the ship was not an "instrument of navigation or commerce engaged in any maritime venture,"

when the appellant's wharfboat sank. *Id.* at 19-20. Historically, federal courts have applied 1 U.S.C. § 3 in determining the vessel status of floating structures for purposes of establishing maritime liens and admiralty jurisdiction. *See supra* note 4 (discussing application of 1 U.S.C. § 3).

¹⁹ *Evansville*, 271 U.S. at 22.

²⁰ *Id.* The Court also noted that because of the permanence of the wharfboat's location, the wharfboat did not encounter the general "perils of navigation" to which vessels engaged in transportation are typically exposed. *Id.*

²¹ 32 F.2d 605 (5th Cir. 1929).

²² *Hayford*, 32 F.2d at 605. The ship, referred to as The Pirate Ship, was an old, run-down United States gunboat that had been refitted as a dance barge. *Id.* After the ship was refitted, it was towed to the Canal Street dock in New Orleans. *Id.* The ship was securely affixed to the dock with clamps and cables, and a permanent gangway extended from the ship to the shore. *Id.* The ship received electricity and water through pipes connected to the land. *Id.* The owners of the ship at no time intended the ship to be used for transporting freight and passengers. *Id.* The ship's sole purpose was to serve as a dance platform. *Id.*

the ship was not subject to a maritime lien.²³ The court stated that the ship's towage to the place of its intended use was not enough to establish a maritime lien.²⁴ Thus, according to the Fifth Circuit's ruling in *Hayford*, mere towage capacity is insufficient to establish that a structure is a vessel for purposes of establishing a maritime lien.²⁵

Similarly, in *Hercules Co. v. The Brigadier General Absalom Baird*,²⁶ the Third Circuit Court of Appeals held

²³ *Id.*

²⁴ *Id.* The Fifth Circuit further noted that even though The Pirate Ship was capable of being towed, that was "not enough to bring it within . . . admiralty jurisdiction." *Id.* The fact that a floating structure is "capabl[e] of . . . movement across navigational water" is not enough to grant it "vessel" status. *Michel v. Total Transp., Inc.*, 957 F.2d 186, 190 (5th Cir. 1992); see *Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990) (stating "structures whose primary function is non-navigational or non-transportational may still qualify as vessels, if the structure was involved in navigation at the time of the injury"); *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 832 n.25 (5th Cir. 1984) (noting difficulty in ascertaining purpose of structure and suggesting list of objective criteria to aid in said determination).

In *J.C. Penny-Gwinn Corp. v. McArdle*, 27 F.2d 324, 324 (5th Cir.), *cert. denied*, 278 U.S. 632 (1928), the Fifth Circuit addressed the status of two dredges employed in pumping sand and other material from the bottom of Biscayne Bay in Florida and distributing it over a privately owned tract of land. *J.C. Penney-Gwinn Corp.*, 27 F.2d at 324. The court stated that "in order to maintain an admiralty lien on a vessel for supplies or advances, that she be at the time engaged in a maritime venture." *Id.* at 325. The court concluded that the dredges were not engaged in commerce or navigation since they were not employed for the purpose of "aiding maritime commerce." *Id.* The court reasoned that since the dredges were solely employed to make improvements on a private tract of land, the dredges were not aiding maritime commerce and, therefore, not subject to maritime liens. *Id.*

²⁵ *Hayford*, 32 F.2d at 605. A more recent decision examining the vessel status of a floating entertainment structure is *In Re River Princess Corp.*, 126 B.R. 837 (Bankr. S.D.N.Y. 1991). This case involved the conversion of a ship into a floating restaurant and night club at a point in time when the ship had been permanently moored to the land. *In Re River Princess Corp.*, 126 B.R. at 838. The court ruled that, while the ship was a vessel for the purposes of admiralty jurisdiction, this factor alone was not determinative of the establishment of a maritime lien. *Id.* at 839. The deciding factor was whether the "services and materials" furnished to the vessel facilitated its use in navigation and commerce. *Id.* Based on the court's analysis, even if a dockside casino was deemed a vessel within admiralty jurisdiction, a maritime lien would not arise if the services and materials furnished did not facilitate the casino's use in navigation. *Id.*

²⁶ 214 F.2d 66 (3d Cir. 1954).

that a "sufficient devotion to marine commerce" was necessary in order for a ship to qualify as a vessel under the Maritime Lien Act.²⁷ The court specifically focused on the ship's intended use at the time the repairs were furnished.²⁸ Since the repairs were furnished in order to ready the ship for a maritime venture, the ship was deemed a vessel for purposes of the Maritime Lien Act.²⁹

²⁷ *Hercules Co.*, 214 F.2d at 69. On several different occasions, the libellant furnished preparatory services to the steamship in order to ready her for the sealing season. *Id.* at 68. At the time the repairs were furnished, the ship had no Coast Guard certification and was unable to sail under her own power. *Id.* In between repairs, the ship was towed to several different locations. *Id.*

²⁸ *Id.* The district court deemed the vessel a "dead ship" because she was not engaged in commerce and lacked any means of self-propulsion. *Id.* Since the vessel was a "dead ship," the court concluded that no maritime lien arose. *Id.* The Third Circuit reversed, finding that the Baird had not been withdrawn from navigation since the Baird was being readied for a sealing voyage off the East Coast. *Id.* at 71-73; see also *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) (stating that difference between vessel and dead ship turned on whether structure had been "withdrawn from navigation"), *cert. denied*, 475 U.S. 1121 (1986).

²⁹ *Hercules Co.*, 214 F.2d at 69. The Third Circuit noted that Coast Guard certification did not of itself determine the vessel status of a floating structure for purposes of admiralty jurisdiction. *Id.* The court further commented that the lack of self-propulsion did not necessarily prevent the floating structure from qualifying as a vessel for purposes of maritime law. *Id.* At the time the libellants furnished the repairs, the ship was capable of being towed. *Id.*

B. Capable of Being Towed

While the classification of a vessel according to the aforementioned cases turned on a floating structure's practical ability to be used in navigation, other courts have employed a much more liberal interpretation in determining the existence of maritime liens. These have not focused on the structure's practical use in navigation, but rather on its ability to move across water, even if such movement was only possible by tow.³⁰

*The Ark*³¹ was one of the earliest decisions to apply a broad interpretation to the statutory definition of a vessel for purposes of establishing a maritime lien.³² This case involved a moored house boat that had been converted into a floating entertainment facility.³³ The federal trial court's classification of the house boat as a vessel for purposes of establishing admiralty jurisdiction and a maritime lien was premised on the fact that the house boat was not permanently attached to the shore and was capable of being towed.³⁴

³⁰ See *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621, 623 (5th Cir. 1955) (relying heavily on ability of ship to be towed in classifying ship vessel subject to maritime lien); *Luna v. Star of India*, 356 F. Supp. 59, 63-66 (S.D. Cal. 1973) (holding ship in maritime museum to be "vessel" because she was "capable of engaging in maritime transportation, if only as a towed craft").

³¹ 17 F.2d 446 (S.D. Fla. 1926).

³² *The Ark*, 17 F.2d at 447.

³³ *Id.* The labor and materials provided to make these changes were the claims upon which the libel was filed. *Id.* At the time of the alterations, the house boat was moored alongside the shore. *Id.* Prior to the alterations, the house boat had for a time been used as a residence. *Id.* The boat had no means of self-propulsion and could only be towed. *Id.*

³⁴ *Id.* at 448. The court reasoned that since the house boat was not permanently attached to the shore, the house boat "more nearly approached the position of a ship temporarily withdrawn from commerce and moored to a dock." *Id.* In determining the vessel status of the house boat, the court applied the definition of a vessel as set forth in 1 U.S.C. § 3. *Id.* at 447.

Similarly, in *The Showboat*, the court specifically relied on the ship's lack of permanent attachment to the shore in ruling that the structure was a "vessel" for the purposes of establishing a maritime lien. *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930). The court reasoned that the *Showboat* was a vessel subject to maritime liens, because "[h]er mooring lines and chains [could] be readily cast off; and

In *Pleason v. Gulfport Shipbuilding Corp.*,³⁵ the Fifth Circuit was called upon to determine the vessel status of a former Navy surplus ship, the Carol Ann, whose only means of transportation was by tow.³⁶ At the time of the repairs, the Carol Ann had no motive power or steering mechanism.³⁷ In reaching its decision, the Fifth Circuit focused on the fact the Carol Ann had been towed both before and after the furnishing of repairs.³⁸ Relying on the literal meaning of the words "capable of being used," the Fifth Circuit held that the Carol Ann was a vessel subject to a maritime lien because she had previously been towed.³⁹

the electric wires [were] . . . so fitted as to be easily detachable." *The Showboat*, 47 F.2d at 287. The court noted that the owner's lack of intent to use the *Showboat* for transportation purposes was not decisive. *Id.* The court distinguished the case at bar from *Evansville* based on the fact that the floating wharfboat in *Evansville* was "not practically capable of being used as a means of transportation." *Id.* at 286. However, the *Showboat* could easily be put to sea. *Id.*

³⁵ 221 F.2d 621 (5th Cir. 1955).

³⁶ *Pleason*, 221 F.2d at 622. The Carol Ann was a Navy salvage and repair vessel built in 1943. *Id.* In 1946 she was sold as surplus and converted into a refrigerated cargo carrier. *Id.* In 1951, while engaged in a shrimping operation, the Carol Ann's engine room was flooded after she became grounded in shallow water. *Id.* The Carol Ann was subsequently towed across the Gulf of Mexico to Port Arthur, Texas where the repairs giving rise to the libels were performed. *Id.* The services and repairs furnished consisted of repairing the refrigeration system and repairing and installing generators and engines. *Id.*

³⁷ *Id.* at 623. When the repairs were made, the ship was in the following condition: her propellers and main engines had been completely removed; she had no electricity; none of her machinery was operable; and all of her steering apparatus had been removed and sold. *Id.* at 622-23.

³⁸ *Id.* at 623. After the repairs were furnished, the Carol Ann was taken by tow to Port Isabel, Texas where she was "moored to a dock by steel cables and ropes and engaged in receiving shrimp from trawlers for processing, freezing, storing and resale in commerce, in the same manner as a similar plant would operate on land." *Id.* The ship was connected with onshore electric and telephone lines. *Id.*

³⁹ *Id.* The Fifth Circuit relied on its earlier decision in *Campbell v. Loznicka* in which it "saw fit to emphasize the words 'capable of being used' in discussing Section 3 of Title 1 of the United States Code." *Id.* In *Campbell*, the ship in question was a Navy bomb target boat converted into a pleasure yacht called the *Scorpio*. *Campbell v. Loznicka*, 181 F.2d 356, 357 (5th Cir. 1950). The Fifth Circuit stated that "[i]t was not essential to admiralty jurisdiction of the court to show that the *Scorpio* had hauled any part of the commerce of the world or that it had navigated any of the seven seas." *Campbell*, 181 F.2d at 359. The Fifth

Relying on *Pleason*, the Fifth Circuit in *Miami River Boat Yard, Inc. v. 60' Houseboat*⁴⁰ held that a motorless houseboat, whose only means of maritime mobility was by tow, was a vessel amenable to a maritime lien.⁴¹ The court stated that the fact that the house boat could only be towed, "as would the most lowly of dumb barges," did not deprive her of her vessel status.⁴² In reaching its decision, the court noted that the term "vessel", for purposes of maritime law, did not require "an intent that the craft be employed in navigation and commerce either at the moment or in the immediate future."⁴³

The second line of cases departs from earlier decisions of the United States Supreme Court which held that the crucial factors for determining a floating structure's vessel status for purposes of maritime law were whether the ship was used, or intended to be used, in navigation at the time the materials or services were furnished and whether such use was practical.⁴⁴ This line of cases further ignores the floating structure's practical use in navigation. According to these cases, if a floating structure is at least capable of being towed, then the statutory definition of a vessel for purposes of maritime law is met, even if the owner had no intentions of putting the floating structure into navigation and any such use

Circuit concluded that the *Scorpio* was "capable of being used, even if inefficiently, in transportation since she was afloat and readily towable. *Id.* Thus, the court ruled that the *Scorpio* was a vessel subject to a maritime lien. *Id.* at 359-60.

⁴⁰ 390 F.2d 596 (5th Cir. 1968).

⁴¹ *Miami River Boat Yard*, 390 F.2d at 597.

⁴² *Id.* The facts revealed that the houseboat had made a lengthy maritime voyage to the libellant's shipyard where the repairs giving rise to the action were performed. *Id.* The houseboat received the repairs in expectation of being towed. *Id.*; see *M/V Marifax v. McCrory*, 391 F.2d 909, 910 (5th Cir. 1968) (applying broad interpretation to statutory definition of vessel as set forth in *Pleason*).

⁴³ *Miami River Boat Yard*, 390 F.2d at 597. The libellant's action was dismissed on summary judgment by the district court. *Id.* The court noted that a maritime structure, without more, did not meet the "plain words" of the statutory definition of a vessel. *Id.* The Fifth Circuit noted that the district court's judgment was improperly influenced by the intent element. *Id.* *Contra* *Hayford v. Doussony*, 32 F.2d 605, 605 (5th Cir. 1929) (holding that ship was not vessel subject to maritime lien since it was not intended to be used in maritime activity).

⁴⁴ *Miami River Boat Yard*, 390 F.2d at 597.

would be impractical.⁴⁵

III. DOCKSIDE CASINOS SHOULD NOT BE DEEMED VESSELS UNDER THE FEDERAL MARITIME LIEN ACT

A. Dockside Casinos Are Not Designed or Intended to be Used in Navigation

A majority of, if not all, dockside casinos are designed to be used exclusively as dockside casinos.⁴⁶ Although dockside casinos are floating structures, they are not designed or intended to be used in navigation as a means of transportation.⁴⁷ This intent is evidenced by the fact that a majority of dockside casinos are permanently moored to land-based structures and lack any means of self-propulsion.⁴⁸ Further, if a dockside casino were to engage in any type of maritime activity, such activity would cost a great deal in the way of both time and money since movement of the dockside casino across water could only be accomplished by tow. This cost would increase dramatically for a casino constructed upon more than one barge since the increased size would require greater tow-

⁴⁵ *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621, 623 (5th Cir. 1955). One may argue that this comment overlooks the fact that maritime liens are also intended as security for persons providing necessities since the majority of vessels can be towed easily out of the jurisdiction of the court on short notice. However, due to the enormous size of the majority of dockside casinos in Mississippi, the permanence of their moorings and the fact that a majority lack any means of self propulsion should alleviate such fears of an overnight escape. The permanence and strength of the casinos dockside moorings are evidenced by the fact that the Harrison County Civil Defense Council's hurricane evacuation plan allows dockside casinos the option of "remaining in place." See *Casino Vessel Hurricane Evacuation Alternatives*, Harrison County, Mississippi, July 1994, at 3, 5-6.

⁴⁶ See Steven E. Psarellis et al., *Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling*, 6 U.S.F. MAR. L.J. 49, 52-54 (1993) (discussing different states' requirements for location and construction of casinos).

⁴⁷ But see Psarellis, *supra* note 46, at 52-53 (noting that Illinois, Iowa, Louisiana, and Missouri statutes prohibit dockside gambling and require riverboats to be navigating before gambling may take place).

⁴⁸ *Anderson v. Maritime Group, Ltd.*, Civil Action No. A-24002-94-0096 (Harrison County Cir. Ct., 2d Jud. Dist., July 18, 1994); see also *Pavone v. Mississippi Riverboat Amusement Corp.*, 1994 WL 97820, at *2 (E.D. La. Mar. 21, 1994) (noting that "courts have unwittingly embolden and nurtured the myths of vessel status").

age assistance. Thus, according to the United States Supreme Court's decisions in both *Cope*⁴⁹ and *The Robert W. Parsons*,⁵⁰ dockside casinos should not be classified as vessels under the Federal Maritime Lien Act since they were not constructed for the purpose of engaging in any type of maritime activity. This conclusion is further strengthened by the Fifth Circuit's decision in *Hayford* involving a ship permanently moored to the land and used entirely for entertainment purposes. The Fifth Circuit concluded that the ship was not a vessel subject to a maritime lien because the "[s]hip was not used, or intended to be used, to carry freight or passengers from one place to another"⁵¹ Clearly, due to the permanence of the moorings and the absence of any means of self propulsion, dockside casinos are not intended to be used in maritime activity.

According to the aforementioned decisions, dockside casinos should not be deemed vessels under the Federal Maritime Lien Act, and therefore, should fall outside the purview of admiralty jurisdiction since they were not constructed for the purpose of engaging in maritime activity and cannot be practically used therefor.⁵²

⁴⁹ *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627 (1887). In concluding that the dry-dock was not a vessel subject to salvage, the Court specifically noted that the dry-dock was "not designed for navigation, and could not be practically used therefor." *Id.*

⁵⁰ *The Robert W. Parsons*, 191 U.S. 17, 34 (1903). The Court decided that the question of admiralty jurisdiction turned on whether the canal boat had been constructed for business usage in commerce or navigation. *Id.*

⁵¹ *Hayford v. Doussony*, 32 F.2d 605, 605 (5th Cir. 1929).

⁵² *Hayford*, 32 F.2d at 605.

B. Classification of Dockside Casinos as Vessels Would be Inconsistent with the Policy Underlying the Federal Maritime Lien Act and Admiralty Jurisdiction

The scope and purpose of admiralty jurisdiction was recently addressed by the Second Circuit Court of Appeals in *Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l.*⁵³ In describing the scope of admiralty jurisdiction, the Second Circuit noted that the "fundamental interest giving rise to maritime jurisdiction was the 'protection of maritime commerce.'"⁵⁴ The court stated that in determining whether a claim encompasses admiralty jurisdiction, federal courts "must initially determine whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."⁵⁵

Due to the permanence of location and the lack of maritime mobility, dockside casinos are clearly divorced from the "business of maritime commerce." As such, claims involving dockside casinos do not give rise to the concerns underlying the Federal Maritime Lien Act and admiralty jurisdiction.⁵⁶ Therefore, dockside casinos should not be subject to maritime liens.

IV. CONCLUSION

The underlying purpose of admiralty jurisdiction, which is the "protection of maritime commerce," is embodied in the

⁵³ 968 F.2d 196 (2d Cir. 1992).

⁵⁴ *Atlantic Mutual Ins.*, 968 F.2d at 200 (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982), noting primary focus of admiralty jurisdiction is unquestionably "protection of maritime commerce").

⁵⁵ *Atlantic Mutual Ins.*, 968 F.2d at 200.

⁵⁶ See Braun, *supra* note 3, at 337 (stating that "Congress' intent in enacting the [Federal Maritime] Lien Act was to make private investment in the shipping industry more attractive by protecting suppliers who enable shipowners to operate vessels by providing credit against the vessel's value") (citing *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 602 (5th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 570 (1987)).

early United States Supreme Court decisions which focused on the intent for which the floating structures were constructed and their business usage in maritime commerce.⁵⁷ Considering the permanence of their attachment to land and their lack of maritime mobility, it is apparent that dockside casinos were not constructed for the purpose of engaging in maritime activity and cannot be practically used therefor.⁵⁸ If dockside casinos were to be deemed vessels under the Federal Maritime Lien Act, such a ruling would contradict the underlying policy of both the Federal Maritime Lien Act and admiralty jurisdiction. In sum, dockside casinos should not be deemed vessels for purposes of the Federal Maritime Lien Act, and therefore, should fall outside the purview of admiralty jurisdiction.

Henry N. Dick, III

⁵⁷ See *supra* notes 10, 15, 19, 22, 27 and accompanying text.

⁵⁸ See *supra* notes 10, 15, 19, 20, 22, 27 and accompanying text.

THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT: IMPACT ON THE MISSISSIPPI GAMING INDUSTRY

I. INTRODUCTION

From pulpits to meeting houses, from civic gatherings to the voting booth, the battle over casino gaming waged incessantly. Eventually, Mississippi proponents of dockside and riverboat gambling emerged victorious.¹ However, the war is not over and the courtroom stands poised as the next battleground. The application of maritime law to insured employees of dockside and riverboat gaming establishments is an important issue which has arisen within the legal foray fueled by the new industry.

Several states, including Mississippi, have recently legalized gambling.² Many other states have considered or are considering legislation allowing riverboat and dockside gaming in their states.³ Because many states have only recently removed prohibitions against gambling,⁴ legal authority governing riverboat and dockside casino litigation is scarce. One of the primary issues presently emerging is whether admiralty and maritime statutes such as the Longshore and Harbor Workers' Compensation Act (hereinafter LHWCA)⁵ and the

¹ MISS. CODE ANN. §§ 75-76-1 to -281 (1991).

² Mississippi, as well as Illinois, Indiana, Iowa, Louisiana, and Missouri all have legalized riverboat gaming. See ILL. ANN. STAT. ch. 230, para. 10/1-10 to 23 (Smith-Hurd 1993); IND. CODE ANN. §§ 4-33-1-1 to 4-33-15-4 (Burns 1994); IOWA CODE ANN. §§ 99F.1 to F.18 (West 1994); LA. REV. STAT. ANN. §§ 4:501-562 (West 1994); MO. ANN. STAT. §§ 313.800-.850 (Vernon 1994).

³ These states include Alabama, Connecticut, Florida, Georgia, Kansas, Maryland, Massachusetts, Minnesota, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. Brian D. Wallace, *An Overview of Issues Pertaining to Dockside and Riverboat Gambling* 1 (1994) (unpublished manuscript for the Southern Admiralty Law Institute, Inc.).

⁴ See, e.g., 15 U.S.C. §§ 1171-1178 (1988).

⁵ 33 U.S.C. §§ 901-48 (1988).

Jones Act⁶ will apply, or whether traditional state law, such as the Mississippi Workers' Compensation Act (hereinafter MWCA),⁷ will govern. This comment focuses on the LHWCA, how it compares to the MWCA and whether its compensation scheme is applicable to casino employees.

II. THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

A. *The Act's Purpose*

The LHWCA provides a cause of action against a vessel owner whose negligence⁸ has caused injury to certain land-based employees "who perform a variety of tasks for, on, and around vessels."⁹ The vast majority of courts, including the Fifth Circuit, has held that the LHWCA should be liberally construed in favor of injured workers.¹⁰ In 1972, Congress extensively overhauled the LHWCA in order to achieve several important goals.¹¹ These goals include: "adequate, increased and sure compensation for injured longshoremen, elimination of the rubric of liability without fault for shipowners, and encourag[ing] safety within the industry by placing the duty of care on the party best able to prevent accidents."¹² Certainly,

⁶ 46 U.S.C. § 688 (1982). For a comprehensive review of tort liability under the Jones Act, see Richard McLaughlin, *Floating Casinos, Personal Injury and Death Claims, and Admiralty Jurisdiction*, 64 MISS. L.J. 439 (1995).

⁷ MISS. CODE ANN. §§ 71-3-1 to -163 (1989).

⁸ 33 U.S.C. § 905(b) (1988). "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . ." *Id.*

⁹ THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 7-1 (2d ed. 1994). Congress passed the LHWCA because at that time, longshore and harbor workers were not included within the purview of state workers' compensation laws due to the maritime nature of their work. *Id.* Workers covered under the LHWCA include longshore workers, persons engaged in longshore activities, ship builders, and ship repairers. 33 U.S.C. § 902(3) (1988).

¹⁰ See, e.g., *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Holcomb v. Robert W. Kirk & Assocs., Inc.*, 655 F.2d 589, 591-92 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983).

¹¹ *Drake v. Raymark Indus., Inc.*, 772 F.2d 1007, 1013 (1st Cir. 1985).

¹² *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2d Cir.

Mississippi decisions implementing these purposes would benefit Mississippi employees falling within the purview of the LHWCA.

B. An Overview of Coverage

After years of grappling for the proper interpretation of the threshold for coverage under the LHWCA,¹³ the United States Supreme Court in 1972 stated that in order for a plaintiff to maintain an action under admiralty law such as the LHWCA, he must make a two-prong "situs" and "status" showing.¹⁴ The Fifth Circuit accordingly has adopted this two-part test to determine whether the LHWCA applies.¹⁵

1977); see *Garofalo v. Malaysia Overseas Export Lines, Inc.*, 470 F. Supp. 166, 168 (S.D.N.Y. 1979) (quoting *Munoz*, 553 F.2d at 839). In 1983, the United States Supreme Court enunciated additional purposes of the 1972 amendments. These included "to raise the amount of compensation available under the LHWCA, to extend coverage of the Act to include certain contiguous land areas, to eliminate longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's claims for indemnification from stevedores, and to promulgate certain administrative reforms." *Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 313 (1983); see *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 73 n.3 (1979).

¹³ Prior to the 1972 amendments, shipowners were strictly liable for injuries that occurred due to the unseaworthiness of their vessels so long as the vessel in question was in navigation and the injured worker was engaged in traditional ship work. *West v. United States*, 361 U.S. 118, 122 (1959); *Wagner v. Sea-Land Serv., Inc.*, 486 F.2d 955, 958 (5th Cir. 1973); see *Drake*, 772 F.2d at 1013.

¹⁴ *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253, 261 (1972). Because a claim under § 905(b) is an admiralty claim, a claimant must satisfy a two-part test for admiralty jurisdiction which parallels the situs-status test. See *SCHOENBAUM*, *supra* note 9, § 7-10. The Fifth Circuit has stated that for an action "to be cognizable under § 905(b), a tort must occur on or in navigable waters . . . and there must be the traditional admiralty nexus." *Richendollar v. Diamond M. Drilling Co., Inc.*, 819 F.2d 124, 125 (5th Cir. 1987); accord *King v. President Riverboat Casino-Mississippi, Inc.*, No. 1:94cv233GR, slip op. at 3 (S.D. Miss. March 10, 1995). In *Richendollar*, the court made clear that a claim under the LHWCA required the application of tests for admiralty tort jurisdiction. *Id.* The Supreme Court solidified the two prong situs and status test holding that both prongs must be met in order for admiralty law to govern. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673 (1982).

¹⁵ *Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1225 (5th Cir. 1989); *Richendollar*, 819 F.2d at 125. Both of these cases expressly rejected *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), and its forerunner, *Lundy v.*

First, in order to receive coverage under the LHWCA, an employee must satisfy the "situs" test.¹⁶ The situs standard set forth in § 903(a) states:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring *upon the navigable waters* of the United States (including any adjoining pier, wharf, drydock, . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).¹⁷

This provision is fairly broad and could potentially provide coverage to employees whose injuries occur in casinos or on the surrounding waterfront.

Second, while a person who is killed or injured on the vessel or on an adjoining structure or area may be able to meet the "situs" test,¹⁸ he must also be an employee engaged in maritime employment.¹⁹ This is known as the "status" prong of the two-part test.²⁰ An employee injured in the course of employment while engaged in one of the operations set forth in § 902(3) will certainly be covered by the LHWCA.²¹ However, if the employee's duties are land-based, the Supreme Court has held that "the § 903 situs will be deemed maritime only if it is

Litton Sys., Inc., 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). These cases "either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under section 905(b)." *Drake*, 772 F.2d at 1016.

¹⁶ See *Munguia v. Chevron USA, Inc.*, 999 F.2d 808, 810 (5th Cir. 1993); see also *Sisson v. Ruby*, 497 U.S. 358, 360-61 (1990) (holding Jones Act case required satisfaction of "locality" or situs test).

¹⁷ 33 U.S.C. § 903(a) (1988) (emphasis added).

¹⁸ *Id.* § 903(a).

¹⁹ Maritime employment includes repairing, building, dismantling, loading, and unloading vessels. 33 U.S.C. § 902(3) (1988); see SCHOENBAUM, *supra* note 9, § 7-2.

²⁰ *Munguia*, 999 F.2d at 810. Prior to 1972, a claimant only had to meet the situs requirement. SCHOENBAUM, *supra* note 9, § 7-2.

²¹ See 33 U.S.C. § 902(3) (1988). The LHWCA does not provide coverage for employees merely because they do their work around a vessel. SCHOENBAUM, *supra* note 9, § 7-2.

an integral or essential part of loading or unloading a vessel."²² The Fifth Circuit has likewise adopted this standard.²³ Nevertheless, employees who restore or repair vessels may also meet the status requirement for coverage under the LHWCA.²⁴ To be eligible for such coverage, it is therefore not imperative that the employee's sole duties are § 902(3) tasks.²⁵ The employee could carry his burden by stating that his occupation, when viewed in its entirety, consists of maritime employment or that he had been engaged in traditional maritime activity at the time of injury.²⁶

Because a claim under the LHWCA is a claim under admiralty law, a plaintiff may also be required to introduce facts alleging the involvement of a "vessel."²⁷ To determine whether a structure is a "vessel," it is likely that Mississippi will follow Louisiana's guidelines requiring that the structure in question be "sufficiently mobile to serve some transportation function."²⁸ In *Texaco Inc. v. Addison*,²⁹ the Mississippi Supreme

²² *Chesapeake & O.R.R. v. Schwalb*, 493 U.S. 40, 45 (1989); see *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985); *Munguia*, 999 F.2d at 810. In *Munguia*, the Fifth Circuit stated that "if [the worker] was not on navigable waters at the time of his injury, . . . he may satisfy the status test only if his work 'is directly connected to the commerce carried on by the ship or vessel. . . .'" *Id.* at 811 (quoting *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1130 (5th Cir. 1991)).

²³ *Munguia*, 999 F.2d at 810. "The Courts of Appeal can be expected to read the LHWCA expansively to hold that any worker whose job is support work that is an essential link to loading, unloading, or ship construction operations eligible for coverage." SCHOENBAUM, *supra* note 9, § 7-2; see *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 756 (5th Cir. 1981), *cert. denied*, 451 U.S. 1163 (1982).

²⁴ *New v. Associated Painting Servs., Inc.*, 863 F.2d 1205, 1210 (5th Cir. 1989).

²⁵ *Pfeiffer*, 444 U.S. at 82-83; *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273 (1977).

²⁶ See, e.g., *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 56-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *Hullinghorst*, 650 F.2d at 756. See generally SCHOENBAUM, *supra* note 9, § 7-2 (discussing time requirements courts have imposed). However, the LHWCA will not cover a casino employee whose longshore or harbor activities are only occasional or of little import. *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 67 (3d Cir. 1992).

²⁷ SCHOENBAUM, *supra* note 9, § 7-10; see, e.g., *King*, No. 1:94cv233GR, slip op. at 4.

²⁸ *Oregon v. Avondale Shipyards, Inc.*, 561 So. 2d 38, 43 (La.), *cert. denied*, 498 U.S. 818 (1990). The Louisiana Supreme Court's standard for determining

Court, citing Louisiana case law, adopted a "capability test" to determine whether a structure is a "vessel."³⁰ The capability test adopted by the *Texaco* court provides that "every description of water craft or other contrivance used or capable of being used as a means of transportation on water" is a vessel.³¹ Gaming vessels which cruise are undoubtedly vessels under the LHWCA.³² However, the question still remains as to whether dockside gaming facilities qualify as vessels.³³

Recently, in *Ketzel v. Mississippi Riverboat Amusement Ltd.*,³⁴ the United States District Court for the Southern District of Mississippi held that the Biloxi Belle Casino was not a vessel under the Jones Act.³⁵ The court stated that although the casino may "sometimes [be] moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the [casino's] primary purpose."³⁶ Even in light of the *Ketzel* decision, it would be unwise to categorically state that no riverboat casino could qualify as a vessel. In fact, some riverboat casinos are capable of navigating on the open waters.³⁷ Additionally, there are a myriad of cases factually similar to *Ketzel* which held that admiralty law does apply.³⁸

whether a structure is a vessel employs a modified capability test. *Avondale Shipyards*, 561 So. 2d at 43-44.

²⁹ 613 So. 2d 1193 (Miss. 1993).

³⁰ *Texaco*, 613 So. 2d at 1193.

³¹ *Id.* (citing *Avondale Shipyards*, 561 So. 2d at 41). While the *Texaco* case dealt with the Jones Act, the decision was based upon *Avondale Shipyards* which determined that a floating work barge with no mode of power was a vessel within the meaning of the LHWCA. *Id. Contra* *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (5th Cir. 1992) (holding floating structures which were incapable of independent movement, were permanently moored, served no transportation function, and had no ability to navigate were not vessels).

³² Wallace, *supra* note 3, at 5.

³³ See Wallace, *supra* note 3, at 3.

³⁴ 867 F. Supp. 1260 (S.D. Miss. 1994).

³⁵ *Ketzel*, 867 F. Supp. at 1268; see *King*, No. 1:94cv233GR, slip op. at 9; *Pavone v. Mississippi Riverboat Amusement Corp.*, No. CIV.A. 93-3354, 1994 WL 97820, at *2 (E.D. La. Mar. 21, 1994).

³⁶ *Ketzel*, 867 F. Supp. at 1268 (citing *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293-94 (5th Cir. 1990)).

³⁷ Wallace, *supra* note 3, at 5-7.

³⁸ See *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 317 (5th Cir. 1990)

C. Exceptions

While § 902 of the LHWCA seems to cover a large group of workers, it also excludes several categories of employees from coverage. One such exception, which may prove important to casino owners, excludes "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. . . ."³⁹ One commentator has noted that "[w]hile this exclusion seems applicable to traditional casino employees, there is a dearth of authority on which to make any firm conclusions in this context."⁴⁰

III. THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THE MISSISSIPPI WORKERS' COMPENSATION ACT

A. Introduction

As noted above, if a casino employee is unable to meet the two-part test, he will be precluded from benefitting under the LHWCA.⁴¹ Further, because of the recent emergence of dockside gaming, it is a largely unsettled question as to which casino employees, if any, can qualify under the LHWCA. Therefore, attorneys are faced with the dilemma of whether to advise their clients to file for compensation under the LHWCA or to proceed under state workers compensation law.

(holding stationary derrick barge used in connection with construction of bridge was covered by Jones Act); *McCarthy v. Bark Peking*, 716 F.2d 130, 133-36 (2d Cir. 1983) (conferring vessel status to moored floating museum under LHWCA), *cert. denied*, 465 U.S. 1078 (1984); *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621, 623 (5th Cir. 1955) (stating navy ship converted into stationary shrimp processing plant was vessel for maritime purposes); *see also* *Brunet v. Boh Bros. Constr. Co.*, 715 F.2d 196, 199 (5th Cir. 1983) (stating pile driving barge may be vessel under Jones Act even though moved only four times in six month period).

³⁹ 33 U.S.C. § 902(3)(B) (1988).

⁴⁰ Wallace, *supra* note 3, at 26.

⁴¹ *Foremost*, 457 U.S. at 673.

B. A Comparison

While the MWCA and the LHWCA both require that the injury or death arise "out of and in the course of employment,"⁴² there are many differences in the compensation schemes of these two statutes. Some of these differences could have a significant impact on the amount and timing of recovery.

The initial issue of importance for a disabled worker is when compensation will begin. Section 71-3-11 of the MWCA provides that payments of benefits may be made after the first five days of the disability,⁴³ while § 906 of the LHWCA allows compensation to be paid after only three days of disability.⁴⁴ Both of these provisions exclude payment for medical benefits.⁴⁵ Mississippi's law provides for compensation to be paid retroactively to the date of disability if the disability continues for at least fourteen days.⁴⁶ The LHWCA allows for benefits to be paid retroactively to the date of the injury after the disability has lasted for more than fourteen days.⁴⁷ Although the variations between the two appear somewhat slight, in certain circumstances, these variations could prove significant.

⁴² 33 U.S.C. § 902 (1988); MISS. CODE ANN. § 71-3-7 (1989); see *Smith v. Container Gen. Corp.*, 559 So. 2d 1019, 1022 (Miss. 1990).

⁴³ MISS. CODE ANN. § 71-3-11 (1989); see also *Central Elec. & Mach. Co. v. Shelton*, 220 So. 2d 320, 323 (Miss. 1969) (stating Workers' Compensation Commission decides when compensation begins).

⁴⁴ 33 U.S.C. § 906 (1988).

⁴⁵ *Id.* § 906(a); MISS. CODE ANN. § 71-3-11 (1972). Medical services and supplies required by the injured employee are not included in the LHWCA's three day nor Mississippi's five day waiting period. 33 U.S.C. § 906(a) (1988); MISS. CODE ANN. § 71-3-11 (1972). Section 907 of the LHWCA sets forth the process by which a disabled worker may obtain medical supplies and services. 33 U.S.C. § 907 (1988). Section 71-3-15 is Mississippi's version. MISS. CODE ANN. § 71-3-15 (1989). The primary difference in these provisions is that under Mississippi law, an employee may select one physician without approval from the employer or any state agency. *Id.* Under the LHWCA, barring special circumstances, the employee must choose a physician from a list prepared by the Secretary of Labor. 33 U.S.C. § 907 (1988).

⁴⁶ MISS. CODE ANN. § 71-3-11 (1989).

⁴⁷ 33 U.S.C. § 906(a) (1988).

Additionally, the rates of recovery are treated differently. Although the MWCA and the LHWCA establish minimum rates⁴⁸ as well as maximum amounts for recovery,⁴⁹ there are notable differences in the methods used to calculate these rates. The LHWCA uses the applicable national average weekly salary to determine maximum recovery,⁵⁰ while the MWCA's maximum is based on the average weekly pay for Mississippi.⁵¹ Under the LHWCA, compensation may not exceed an amount equivalent to 200% of the applicable national average weekly wage.⁵² Furthermore, the minimum amount an injured longshore or harbor worker may obtain is fifty percent of the applicable national average weekly wage or fifty percent of his or her weekly salary at the time of injury.⁵³ In Mississippi, the maximum a disabled worker could obtain is sixty-six and two-thirds percent of the average weekly wage as set by the state for a period of 450 weeks.⁵⁴ The minimum, however, is twenty-five dollars per week.⁵⁵ This evident disparity could have a great effect on an injured worker's recovery.

Probably the most compelling differences between the LHWCA and the MWCA are the amount of compensation and the duration of payment for permanent total disability, temporary total disability, and permanent partial disability. If an

⁴⁸ Compare MISS. CODE ANN. § 71-3-13 (1989 and Supp. 1994) with 33 U.S.C. § 906(b)(2) (1988).

⁴⁹ Compare MISS. CODE ANN. § 71-3-13 (1989 & Supp. 1994) and 33 U.S.C. § 906(b)(1) (1988) with 33 U.S.C. § 906(b)(2) (1988).

⁵⁰ Compare MISS. CODE ANN. § 71-3-13 (1989) with 33 U.S.C. § 906(b)(1) (1988).

⁵¹ MISS. CODE ANN. § 71-3-13(2) (1988).

⁵² 33 U.S.C. § 906(b)(1) (1988).

⁵³ *Id.* § 906(b)(2); see *id.* § 910.

⁵⁴ MISS. CODE ANN. § 71-3-13(2) (1989). The "average weekly wage for the state" is set and revised periodically by the Workers' Compensation Commission after reviewing employment statistics provided by the Mississippi Employment Security Commission. VARDAMAN S. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 37 (3d ed. Supp. 1990).

⁵⁵ MISS. CODE ANN. § 71-3-13(1) (1989). Twenty-five dollars is the usual minimum, "except in partial dependency cases and in partial disability cases." *Id.* § 71-3-13. Neither the Legislature nor the Mississippi Supreme Court has addressed what the minimum amount would be in these cases.

injured worker has suffered a total and permanent disability,⁵⁶ Mississippi law requires an employer to pay sixty-six and two-thirds percent of the injured employee's average weekly wage for 450 weeks or the average weekly wage for the state for 450 weeks, whichever is the lesser amount.⁵⁷ Similar to Mississippi's law, the LHWCA also pays an injured employee sixty-six and two-thirds percent of the average weekly wage.⁵⁸ However, the LHWCA, requires that these wages "be paid to the employee during the continuance of such total disability."⁵⁹ The difference between recovery for temporary total disability under the MWCA and the LHWCA parallels the variance in compensation for permanent total disability.⁶⁰ Therefore, the statute under which an injured employee is covered could mean the difference in whether he is compensated for the rest of his life or for 450 weeks.⁶¹

Furthermore, there is a discrepancy in the number of weeks during which an injured employee may receive compensation for permanent partial disability under the LHWCA and the MWCA.⁶² According to Mississippi law, a worker who loses an arm in the course of employment would receive sixty-six and

⁵⁶ To receive compensation for permanent total disability, an injured employee must prove either the "[l]oss of both hands, or both arms, or both feet, or both legs, or both eyes, or . . . any two thereof." 33 U.S.C. § 908(a) (1988); MISS. CODE ANN. § 71-3-17(a) (1989).

⁵⁷ MISS. CODE ANN. § 71-3-17 (1989).

⁵⁸ 33 U.S.C. § 908(a) (1988).

⁵⁹ *Id.*

⁶⁰ *Id.* § 908(b); MISS. CODE ANN. § 71-3-17(a) (1989). An employee who sustains temporary total disability may receive 66 and 2/3% of his average weekly wage or the average weekly wage for the state for 450 weeks. MISS. CODE ANN. § 71-3-17 (1989). Under the LHWCA, an injured employee receives the same amount of wages, but receives them for the *duration* of his disability. 33 U.S.C. § 908(b) (1988) (emphasis added).

⁶¹ An 18 year old employee covered only by Mississippi workers compensation who becomes permanently or temporarily totally disabled in the course of employment could possibly rely on compensation to continue for approximately a mere one and one-thirds year. MISS. CODE ANN. § 71-3-17(a)-(b) (1989). Under the LHWCA the young employee could receive compensation for life. 33 U.S.C. § 908(a)-(b) (1988).

⁶² Compare 33 U.S.C. § 908(c) (1988) with MISS. CODE ANN. § 71-3-17(c) (1989).

two-thirds percent of the state's average weekly wage for 200 weeks.⁶³ By way of comparison, under the LHWCA, the same worker would receive compensation for 312 weeks.⁶⁴ The difference in duration of compensation for the loss or damage of other body members is even larger.⁶⁵ Consequently, under the LHWCA, an injured employee stands to be substantially better compensated.

Coverage for death and funeral expenses is also treated differently under the MWCA and the LHWCA.⁶⁶ Section 909 of the LHWCA allows for reasonable funeral expenses of up to \$3,000.⁶⁷ Mississippi law places a \$2000 cap on funeral costs.⁶⁸ However, in addition to other compensation benefits, the MWCA does provide for an immediate lump sum of \$250 to be paid to the widow.⁶⁹ The major difference between these two provisions is the percentage of average wages survivors receive upon the death of an employee. In Mississippi, a wife or dependent husband may receive thirty-five percent of the deceased's average wages for the rest of his or her life, plus ten percent for each surviving child— fifteen percent per child if the surviving spouse remarries.⁷⁰ These amounts, however, may not exceed the overall sixty-six and two-thirds percent limitation.⁷¹ Furthermore, upon the death of a covered em-

⁶³ MISS. CODE ANN. § 71-3-17(c)(1) (1989). This section lists the number of weeks an injured employee may be compensated for lost or disabled body parts. *Id.* § 71-3-17(c).

⁶⁴ 33 U.S.C. § 908(c)(1) (1988). This section, like § 71-3-17(c), lists the number of weeks an injured employee may be compensated for amputated or disabled body parts. *Id.* § 908(c).

⁶⁵ Under the MWCA, an injured employee may receive 150 weeks compensation for a lost hand. MISS. CODE ANN. § 71-3-17(c)(3) (1989). The same worker could receive 244 weeks compensation under the LHWCA. 33 U.S.C. § 908(c)(3) (1988). Both statutes provide that compensation for partial loss or partial loss of use of an appendage will be proportionate. 33 U.S.C. § 908(c)(19) (1988); MISS. CODE ANN. § 71-3-17(c)(23) (1989).

⁶⁶ Compare 33 U.S.C. § 909 (1988) with MISS. CODE ANN. § 71-3-25 (1989).

⁶⁷ 33 U.S.C. § 909(a) (1988).

⁶⁸ MISS. CODE ANN. § 71-3-25(b) (1989).

⁶⁹ *Id.* § 71-3-25(a).

⁷⁰ *Id.* § 71-3-25(c).

⁷¹ *Id.* Additionally, if there is no surviving spouse, each child receives 25% of the average wages up to 66 and 2/3%. *Id.* § 71-3-25(d). If there are no surviving

ployee, the total amount payable to his beneficiaries may not exceed sixty-six and two-thirds percent of Mississippi's average weekly wage paid for 450 weeks nor may it exceed 450 weeks of the deceased employee's former average wage.⁷² In contrast, under the LHWCA, the widow or widower may receive fifty percent of the average wage and, upon remarriage, may receive two years compensation in one lump sum.⁷³ For the surviving children, the widow or widower may receive an additional sixteen and two-thirds percent of the average wages.⁷⁴ After the death or remarriage of the spouse, the children's compensation is raised to fifty percent plus an extra sixteen and two-thirds percent for each additional child.⁷⁵ The LHWCA does, however, also have the sixty-six and two-thirds percent limitation on total compensation.⁷⁶

It is important to note that before a dispute over whether compensation is due under one scheme or the other turns into a court battle, the injured worker must have exhausted all administrative remedies.⁷⁷ In light of this, attorneys must be aware that decisions by the Workers' Compensation Commission will be accorded deference by the courts of Mississippi.⁷⁸ Additionally, the Fifth Circuit has set forth a similar standard of review for an appeal of a decision by the LHWCA's Benefits

children, each grandchild and sibling may obtain 15% as compensation provided that the grandchild or sibling was dependent upon the employee at the time of his or her death. *Id.* § 71-3-25(e).

⁷² MISS. CODE ANN. § 71-3-25(f) (1989). Finally, § 71-3-25(g) establishes that "dependency shall be determined as of the time of the injury." *Id.* § 71-3-25(g). Widows and children are "presumed to be wholly dependent." *Id.* Whether another is dependent, totally or partially, will be decided on the facts of the particular case. *Id.*

⁷³ 33 U.S.C. § 909(b) (1988).

⁷⁴ *Id.* § 909(b).

⁷⁵ *Id.* § 909(c).

⁷⁶ *Id.* § 909(b)-(c). A survivor cannot obtain weekly death benefits in excess of the amount an injured worker would have received under § 906(b)(1). *Id.* § 909(e)(1).

⁷⁷ *Connors v. Amax Coal Co.*, 858 F.2d 1226, 1228 (7th Cir. 1988).

⁷⁸ *See, e.g., Metal Trims Indus., Inc. v. Stovall*, 562 So. 2d 1293, 1296-97 (Miss. 1990) (stating that decision based on substantial evidence will not be overturned).

Review Board.⁷⁹

IV. CONCLUSION

Along with change comes challenge. A new employment frontier has quickly burgeoned in Mississippi⁸⁰ spawning new legal questions. As a result, many Mississippi lawyers are being called upon for the first time to litigate issues of admiralty and maritime law. One of the responsibilities of these lawyers will be to determine whether an injured employee may seek redress under the LHWCA.

The exceptions contained in the LHWCA appear to exclude casino workers from coverage.⁸¹ In this provision lies the casinos' best defense. Moreover, if Mississippi courts follow the *Ketzel* court's lead, employees who bring suit under the LHWCA may fail due to the absence of a "vessel."⁸²

However, a plaintiff who successfully proves coverage under the LHWCA will be in a substantially better position than one falling within the similar Mississippi workers' compensation scheme. While the goal of workers' compensation, whether achieved under the LHWCA or the MWCA, is to promote the well-being of workers,⁸³ the two statutes have some profound variations.⁸⁴ Longer periods for compensation will undoubtedly be the difference that prompts injured casino employees to file for benefits under the LHWCA.⁸⁵ Therefore, whether the casino employee may benefit under the LHWCA is an issue of prime importance to both the casino industry and potential plaintiffs.

Christy Crockett

⁷⁹ See, e.g., *Munguia*, 999 F.2d at 810 (explaining that issues on appeal were limited to errors of law and failure to adhere to statutory standard of review).

⁸⁰ See McLaughlin, *supra* note 6, at 440-41.

⁸¹ See *supra* notes 39-40 and accompanying text.

⁸² See *supra* notes 27-38 and accompanying text.

⁸³ See *supra* note 12 and accompanying text.

⁸⁴ See *supra* notes 42-76 and accompanying text.

⁸⁵ See *supra* notes 56-65 and accompanying text.

CASINOS AND THE COMPULSIVE GAMBLER: IS THERE A DUTY TO MONITOR THE GAMBLER'S WAGERS?

I. INTRODUCTION

The Mississippi Legislature legalized dockside gambling on the waters of the Mississippi River and the Mississippi Gulf Coast in 1990.¹ Since that time, the growth of the industry has been phenomenal, with thirty casinos now operating in the state.² These new businesses create jobs, increase tax revenues and improve tourism for the state; however, in addition to the much extolled economic benefits, there appears to be a less positive aspect of legalized gaming — compulsive gambling.

As the number of compulsive gamblers increases, the industry, the practicing bar of Mississippi and the courts will be forced to examine and define the legal relationship between the casino and the compulsive gambler. This comment will explore this relationship through a discussion of the potential claims against casinos by compulsive gamblers and related parties. It will also seek to assess the validity of such claims in light of general legal principles and judicial rulings from foreign jurisdictions.³

¹ MISS. CODE ANN. § 97-33-1 (Supp. 1994). The statute exempts "vessels" and "cruise vessels" which meet certain criteria from the general prohibition against gambling in the state. *Id.*

² Telephone Interview with Stacy Hammond, Mississippi Gaming Commission (Feb. 3, 1995).

³ The courts have yet to decide firmly whether floating casinos qualify as "vessels" and meet other requirements necessary to fall within federal admiralty jurisdiction. *See, e.g.,* Steven E. Psarellis et al., *Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling*, 6 U.S.F. MAR. L.J. 49, 61 (1993) (presenting argument that riverboat casinos do not fall within bounds of admiralty jurisdiction). For the remainder of this comment, the potential claims against riverboat casinos will be treated as though they fall within the realm of state tort law.

II. COMPULSIVE GAMBLING

Compulsive gamblers lack the capacity to consistently withstand the urge to gamble.⁴ Persons affected by the disease are controlled by an irresistible impulse to gamble which, over time, drains the victim financially, emotionally and physically, often destroying all meaning in his life.⁵ Estimates indicate that between five and ten percent of those regularly participating in gaming activities are compulsive gamblers.⁶

Although compulsive gambling is an identifiable disease, the presence of other problems, such as drug or alcohol addiction, often masks its presence.⁷ The exact number of compulsive gamblers in Mississippi is unknown; however, reports from various sources indicate that the number has grown substantially since the casinos arrived. For example, Gamblers Anonymous, a self-help group for problem gamblers, reports increased attendance at existing groups, as well as the founding of new groups in areas most affected by the casinos.⁸ The

⁴ Sarah C. Campbell, *Miss. Council Wants Casinos to Help Compulsive Gamblers*, COM. APPEAL (Memphis), Oct. 28, 1994, at B1. Recovering compulsive gamblers allege that the disorder robs them of the ability to control their wagers. Jon Schmitz & Tom Barnes, *Some Bettors Play Too Long and Wager Too Much*, PITTSBURGH POST-GAZETTE, Aug. 23, 1994, at A5. For example, one woman reports that she routinely lost in excess of \$5000 per night gambling. *Id.*

⁵ ROBERT CUSTER & HARRY MILT, *WHEN LUCK RUNS OUT* 35 (1985). The World Health Organization and the American Psychiatric Association recognize compulsive gambling as an illness. *Id.* at 36. Victims of the disorder often attribute their losses to bad luck and claim that they possess the ability to control their actions. *Id.* at 37. This attitude mirrors the "denial" stage observed in other addictions, including alcoholism. *Id.*

⁶ Campbell, *supra* note 4, at B1. Other studies indicate that the disorder afflicts between two and six percent of American adults. Schmitz & Barnes, *supra* note 4, at A5. Some experts assert that only approximately four percent of gamblers are compulsive gamblers, but these same sources indicate that an additional 10-15% of gamblers wager beyond their means. Chris Welles, *America's Gambling Fever: Everybody Wants a Piece of the Action — But Is It Good for Us?*, BUS. WK., Apr. 24, 1989, at 120. This 20% of the gambling population reportedly accounts for 50% of all money wagered. *Id.*

⁷ Charles Bernsen, *Miss., Tenn. Keep Their Distance From Gambling Addict Problems*, COM. APPEAL (Memphis), Apr. 5, 1994, at A1.

⁸ Schmitz & Barnes, *supra* note 4, at A5. A Gamblers Anonymous group in

number of cases treated by the state's Mental Health Services has also increased,⁹ and a national hotline reports receiving between 100 and 200 calls per month from Mississippi since the introduction of legalized gambling.¹⁰ Concern over these statistics, and the problems they represent, has led to calls for industrial and governmental involvement in compulsive gambling treatment programs in the state.¹¹

Memphis, Tennessee, attributes its membership increase to the legalization of gambling in Mississippi. *Id.* Additionally, Gamblers' Anonymous has organized eight new support groups in southern Mississippi to combat the impact of the casinos. *Id.*

⁹ *Id.* Counselors at the Warren-Yazoo Mental Health Service, which serves the city of Vicksburg, report that the opening of the Vicksburg casinos resulted in approximately 20 cases of compulsive gambling within six months. *Id.* Officials of the mental health district encompassing Tunica County are unsure as to the number of compulsive gamblers that are present in the area, since many of the cases are handled in conjunction with treatment for alcohol or drug abuse. Bernsen, *supra* note 7, at A1. However, the executive director of the district acknowledges that the number is significant and predicts that the issue will "become a very public problem very soon." *Id.*

¹⁰ Schmitz & Barnes, *supra* note 4, at A5. According to officials with the Council on Compulsive Gambling, the hotline received only 10 calls each month from Mississippi prior to the legalization of gambling. *Id.*

¹¹ Campbell, *supra* note 4, at B1. In late 1994, supporters of the creation of a Mississippi Council on Compulsive Gambling approached casinos to suggest that such an organization should be financed by voluntary contributions from the casinos. *Id.* The proposed council would provide counseling and other services to compulsive gamblers and would presumably relieve some of the burden currently resting on self-help groups, private therapists and private hospitals. Bernsen, *supra* note 7, at A1. However, no action was taken on the matter. Campbell, *supra* note 4, at B1. A bill which would have imposed a .1% tax on gross casino revenues to be used to fund treatment programs failed in the Mississippi House Ways and Means Committee in 1994. Bernsen, *supra* note 7, at A1.

Approximately 15 states fund compulsive gambling treatment programs. Campbell, *supra* note 4, at B1. A three percent tax on gaming supports treatment programs in Iowa. Bernsen, *supra* note 7, at A1. In New Jersey, the initial \$500,000 in fines imposed on casinos goes to support the Compulsive Gambling Council. *Id.* However, neither of the two largest riverboat gambling states, Mississippi and Illinois, have provided for any of the gaming revenue to be set aside for treatment programs. Schmitz & Barnes, *supra* note 4, at A5.

Casinos claim to address the problem through posting hotline numbers, funding educational programs aimed at curbing underage gaming, contributing to existing programs and advising patrons to gamble responsibly. Bernsen, *supra* note 7, at A1; see also Schmitz & Barnes, *supra* note 4, at A5 (noting casinos' involvement with compulsive gambling programs).

However, implementation of a full-scale treatment program will not eliminate the problem, since many compulsive gamblers will not avail themselves of treatment.¹² Therefore, the issue of potential casino liability in connection with compulsive gamblers remains a viable one, even as the state and the industry attempt to alleviate the problem.

Claims arising from the relationship between casinos and compulsive gamblers fall generally into two categories: (1) claims brought by the compulsive gambler to recover losses; and (2) claims brought by a representative of the compulsive gambler under the applicable wrongful death statute.

III. CLAIMS BY THE COMPULSIVE GAMBLER

The most common claim of the compulsive gambler is that he should not be liable for his gambling debts due to his disorder. These claims, often raised as counterclaims in actions commenced by casinos to collect past-due debts, are primarily tort claims which allege that the casino breached a duty to the gambler. However, a gambler might choose to advance a contract-based claim as well.

A. Tort Claims

Any claimant bringing an action based on negligence principles must establish four elements in order to be successful.¹³ The compulsive gambler faces a tremendous hurdle in establishing the first of these elements, that of a duty owed to the gambler by the casino.

¹² See CUSTER & MILT, *supra* note 5, at 37 (observing that denial prevents individuals from recognizing that they suffer from compulsive disorders and therefore prevents them from seeking help).

¹³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984). A successful negligence action requires that the plaintiff show: (1) the defendant owed to the plaintiff a legally recognized duty or obligation; (2) the defendant breached the duty; (3) the breach was the proximate cause of plaintiff's injury; and (4) the plaintiff suffered actual damages. *Id.*

1. Claims Distinguished from "Dram-Shop" Claims

Prior to a discussion of possible factors giving rise to an enforceable duty on the part of a casino toward a compulsive gambler, it is important to note that these claims are not based on excessive alcohol consumption nor an extension of "dram-shop" liability *per se*.¹⁴ Claims alleging that a casino allowed an obviously intoxicated gambler to continue to wager have met with some success in the courts.¹⁵ However, regardless of the validity of such claims, they may be distinguished from the claims which are the subject of this comment. The claims involved here allege that a duty to the compulsive gambler arises as a result of his mental condition. This distinction does not negate the potential usefulness of an analogy between the rationale underlying "dram-shop" laws and the proposed rationale for creating a duty requiring casinos to monitor the behavior of compulsive gamblers. Instead, the distinction clarifies the scope of this comment.

2. Case Law

In 1983, a compulsive gambler sought debt cancellation and restitution of losses from a casino which allegedly had "preyed on [the gambler's] sickness" and caused him to incur losses beyond his financial resources.¹⁶ The complaint did not

¹⁴ "Dram-shop" liability is the common name for liability imposed upon tavern owners for injuries resulting from the owner's service of alcohol to a visibly intoxicated patron. Jeffrey C. Hallam, Comment, *Rolling the Dice: Should Intoxicated Gamblers Recover Their Losses?*, 85 NW. U. L. REV. 240, 244 (1990). Claims brought by gamblers seeking to recoup losses due to intoxication while wagering are merely claims arguing that casinos should be included in the establishments affected by "dram-shop" liability.

¹⁵ See, e.g., *GNOC Corp. v. Aboud*, 715 F. Supp. 644, 655 (D.N.J. 1989) (stating that casino has duty to prevent wagering by visibly intoxicated player); *Great Bay Hotel & Casino, Inc. v. Tose*, No. 91-600, 1991 WL 639131, at *6 (D.N.J. Dec. 16, 1991) (noting that *Aboud* allows gambler to assert negligence claim against casino which allowed gambler to wager while obviously intoxicated). But see Barbara Gotthelf, *Casinos Not Subject to Dram-Shop Suits, Judge Rules*, N.J.L.J., Apr. 18, 1994, at 3 (reporting that casinos were not liable for losses incurred by intoxicated persons).

¹⁶ Fen Montaigne, *High Stakes: Compulsive Gamblers Taking Casinos to*

specify the precise duty which it claimed a casino owed its patrons, but the case appears to have been based on a presumed duty to look after the best interests of the player. The case settled, so a jury never examined the existence or non-existence of such a duty.¹⁷ Despite the settlement of the claim, the case generated considerable attention in the gaming industry. Casino officials claimed that saddling them with the two-fold burden of identifying problem gamblers and controlling their activities would be unjust and would be a virtually impossible standard to satisfy.¹⁸ A casino spokesperson, reflecting the general response of the industry, noted that, "There is not, and there should not be, any duty imposed on the casino to ensure that plaintiff and other patrons do not lose their money. Gambling by definition is a risky business. It is also a legal one."¹⁹

In 1984, it was alleged that a casino granted credit and thereby encouraged the gaming activity of a person whom the casino knew, either actually or constructively, to be a compulsive gambler.²⁰ The judge held that the casino followed state regulations in extending credit to the gambler and could not

Court, PHILADELPHIA INQUIRER, Mar. 9, 1986, at A1. The claim, filed by John Heymann in New Jersey state court, stated that the casino "recklessly and negligently" granted him credit and permitted him to imbibe excessive amounts of complimentary alcohol as part of "an elaborate scheme" to cause compulsive gamblers to continue their gambling activities. *Id.*

¹⁷ *Id.* Officials in the gaming industry observed that the settlement probably resulted from the casino's unwillingness to risk allowing the case to go to trial due to the potentially devastating effect on the entire industry if the gambler prevailed. *Id.*

¹⁸ *Id.* Gambling officials maintained that allowing a compulsive gambler to recover on Heymann's theory would be equivalent to allowing a compulsive over-eater to recover from a restaurant or permitting a compulsive shopper to bring an action against a department store. *Id.*

¹⁹ *Id.* The spokesperson also claimed that the casino bore no obligation to recognize a compulsive gambler and treat him differently from an ordinary patron. *Id.*

²⁰ *Id.* The claim arose after the casino sought to enforce an unpaid debt. *Id.* The gambler responded with the counterclaim seeking to recover her losses. *Id.* The counterclaimant alleged that the more she lost, the more credit the casino extended, even after it was apparent that she suffered from a gambling addiction. *Id.*

be punished for losses resulting from the player's subsequent wagers.²¹

In 1989, a compulsive gambler initiated an action in the United States District Court for the Eastern District of Pennsylvania, asserting the same claim raised in the 1983 action discussed above.²² The defendant casino countered with an action in state court to recover past-due debts.²³ The state court judge ruled that the gambler's defense to the debt, which was his claim in federal court, was without merit and observed that to accept the position advanced by the gambler would place an impossible burden on the casino industry to identify and control compulsive gamblers.²⁴ The district court ruled that the doctrine of res judicata prevented relitigation of the issues and granted the casino's motion for judgment as a

²¹ Montaigne, *supra* note 16, at A1. The judge ruled that the practice of extending credit was authorized by state law and could not be the justification for allowing a losing player to recover. *Id.* The judge also noted that legislative action on the issue had made it apparent that the state favored gambling as a matter of public policy. *Id.*

Much of the betting which takes place on casino floors involves chips obtained through credit extended by the casino. Michele DiGirolamo, *Compulsive Gambler Challenges Casinos' Credit Policy*, UPI, July 16, 1989, available in LEXIS, Nexis Lib., UPI File. According to an official with the New Jersey Casino Control Commission, the economic viability of the gaming industry would be threatened if credit could not be extended to patrons. *Id.* For sample credit regulations bearing upon casinos see ILL. ANN. STAT. ch. 230, para. 10 (Smith-Hurd 1993) (allowing extension of credit for use on riverboat casinos); NEV. REV. STAT. ANN. § 463.368 (Michie 1994) (outlining credit procedures for Nevada casinos under Nevada Gaming Control Act); N.J. STAT. ANN. § 5:12-101 (West Supp. 1994) (establishing credit guidelines for casinos under state's Casino Control Act).

²² DiGirolamo, *supra* note 21. The gambler, Sheldon Karabell, alleged that the casinos took advantage of his compulsive gambling disorder by providing him with complimentary accommodations, alcohol and extending large amounts of credit to him. *Id.*

²³ Michele DiGirolamo, *Compulsive Gambler Loses A.C. Casino Suit*, PHILADELPHIA INQUIRER, Mar. 31, 1990, at B1. The casinos filed their action in Atlantic County Superior Court just two months after Karabell filed his action. *Id.*

²⁴ *Id.* The judge opined that the duty which the player wished to establish would essentially require casinos to perform a mental exam of all credit applicants before extending credit. *Id.* The judge dismissed such a duty as absurd. *Id.* An important aspect of this case for future claimants is that the gambler neither gave notice of his disorder, nor requested that the casino cease extending him credit. *Id.*

matter of law.²⁵

*Harrah's Club v. Van Blitter*²⁶ involved a claim similar to those discussed above.²⁷ The gambler in *Van Blitter* explicitly stated that the casino breached its duty to conduct a "fair game" by its failure to control her wagers once it was apparent that she was losing. The plaintiff alleged that the breach was aggravated by the complimentary lodging and meals she received from the casino. The United States District Court for the District of Nevada rejected Van Blitter's argument and held that there was no support for imposing tort liability on the casino.²⁸ In its opinion, the court stated that casinos did not have a duty to force unsuccessful players to stop betting. The court also observed that if such a duty existed, the industry would soon fail because there would be no potential for economic success.²⁹ Although this decision appears almost identical to the cases mentioned earlier, a statement by the court regarding the casino's awareness of Van Blitter's mental status warrants particular attention. In absolving the casino of liability, the court noted that the casino had no knowledge of those problems which caused Van Blitter to begin gambling, and evidenced no intent to take advantage of a "demonstrable psychological weakness."³⁰

²⁵ *Karabell v. Caesar's on the Boardwalk*, No. 89-2885, 1990 WL 59359, at *3 (E.D. Pa. May 4, 1990).

²⁶ Nos. Civil R-85-267 BRT, Civil R-86-21 BRT, 1988 U.S. Dist. LEXIS 18348 (D. Nev. Feb. 16, 1988).

²⁷ Van Blitter alleged that the casino encouraged her to continue to wager even though she was a terribly inept blackjack player. *Van Blitter*, 1988 U.S. Dist. LEXIS 18348, at *4-5.

²⁸ *Id.* at *6. The court pointed out that Van Blitter failed to provide any authority supporting her claim that the casino owed the alleged duty to her as a patron. *Id.* at *5.

²⁹ *Id.* at *6. The court also held that the efforts of the casino to attract business through complimentary services did not establish tort liability. *Id.*

³⁰ *Id.*

3. Potential Success of Future Claims

The previously discussed cases favor casinos in actions for restitution brought by compulsive gamblers. The courts which have addressed the issue have uniformly held that the gambler cannot recover under tort law due to the absence of a duty on the part of the casino to recognize a compulsive gambler and, thereafter, monitor his betting activity. These cases clearly demonstrate that a gambler will not prevail on his claim unless he can show exigent circumstances which impose upon the casino an enforceable duty.³¹

The gambler's potential for recovery seems strongest in a situation where a casino, with actual knowledge of the gambler's compulsive disorder, ignores such knowledge and permits on-going gambling. In such a situation, the gambler might persuasively argue that the casino's knowledge gave rise to a duty which the casino subsequently breached by failing to bar the gambler from the gaming tables. However, casinos will undoubtedly point out that if they possess actual knowledge of the player's problem, then the player also possesses that knowledge and should bear the responsibility for controlling his own actions.³² In sum, a compulsive gambler could invoke the dicta in *Van Blitter* to argue that a casino actually knew of his disorder and, by allowing continued gambling, failed to act as a reasonably prudent party in response

³¹ The Nevada Legislature took direct action on the issue of claims by compulsive gamblers by enacting a provision within its Gaming Control Act which states that "[a] patron's claim of having a mental or behavioral disorder involving gambling" does not constitute a defense to an action to collect on a credit instrument and is not a valid counterclaim in a collection action. NEV. REV. STAT. ANN. § 463.368(6) (Michie 1994). This provision precludes a claim by a compulsive gambler regardless of the surrounding circumstances.

³² This argument by the casinos is particularly persuasive in those states which have mechanisms allowing the compulsive gambler to place his name on a "no-credit" list with the casinos. See, e.g., N.J. STAT. ANN. § 5:12-101(j) (West Supp. 1994) (providing that compulsive gambler may request that casinos not extend him credit by placing his name on list distributed to credit departments). Even without such a provision, however, the casinos may base the argument on a theory of personal responsibility.

to that knowledge. The actual merit of this complaint is unclear, since no gambler has yet produced evidence of actual knowledge on the part of a casino.

A compulsive gambler bringing a tort claim for recovery of losses will probably claim that the public policy arguments underlying the imposition of liability on tavern owners under "dram-shop" laws apply equally to support imposing a duty on the casino industry to monitor compulsive gamblers.³³ "Dram-shop" legislation creates a duty precluding tavern owners from serving alcohol to an obviously intoxicated patron and holds an owner liable for injuries proximately caused by the patron if the duty is breached.³⁴ The justification underlying this liability is that the bartender is in the best position to avoid the foreseeable harm by refusing to serve the intoxicated patron. It is conceivable to argue that the same rationale applies to a compulsive gambler and a casino employee. However, there are two important distinctions between these situations. First, the compulsive gambler's actions are presumably harmful only to the gambler himself. Many true "dram-shop" laws, as well as Mississippi's legislation,³⁵ impose liability only when a third party is injured by the intoxicated person.³⁶ Secondly, the application of this principle to compulsive gamblers raises a problem of foreseeability. "Dram-shop" liability attaches when a bartender serves alcohol to an obviously in-

³³ Cf. Bartholomew Sullivan, *Woman Sues Splash Casino on Suicide of Estranged Husband*, COM. APPEAL (Memphis), Dec. 14, 1994, at B1 (noting that attorney for gambler's wife borrowed his theory of liability from "dram-shop" legislation).

³⁴ Hallam, *supra* note 14, at 244.

³⁵ MISS. CODE ANN. § 67-1-83 (1991). This section imposes criminal liability on persons selling alcohol to a member of the proscribed class. *Id.* Thus, it is not a true "dram-shop" act which would impose civil liability on bar owners for injuries to third parties. *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 348 (Miss. 1986).

³⁶ See, e.g., *Cuevas*, 498 So. 2d at 348 (holding that adult who voluntarily consumed alcohol and sustained injuries could not recover under § 67-1-83); NAT'L ALCOHOLIC BEVERAGE CONTROL ASS'N, A COMPILATION OF DRAM SHOP STATUTES AND JUDICIAL RULINGS 3 (4th ed. 1984) (stating that purpose of dram-shop legislation is to protect third parties injured due to actions of intoxicated patron served by tavern owner).

toxicated customer. Therefore, there is a reasonably objective standard, that of visible intoxication, by which a bar owner may judge his actions. No such standard exists to distinguish between a casual gambler on a losing streak and a compulsive gambler in debt beyond his financial means. If the law required casinos to make such a distinction, one could argue that the only way to avoid liability would be to establish a limit on the losses which a gambler could incur before asking him to cease gambling.³⁷ The flawed nature of such a provision is obvious. Due to the varying economic levels of patrons, it would be impossible to establish a level which would protect all players while still allowing the casual gambler to push his luck to the limit. Thus, although the analogy to "dram-shop" liability appears to provide support for the imposition of a duty on casinos to monitor compulsive gamblers, there are fundamental differences which make the extension of such liability to the gaming industry essentially impossible.

B. Claims Based on Contract Law

Common-law contract defenses, such as incapacity, duress and unconscionability, provide compulsive gamblers with another arguable basis for cancellation of their gambling debts. For a compulsive gambler's contract claim to succeed, the courts must accept the proposition that the markers representing gaming debts, which the casino seeks to enforce and the gambler seeks to have rescinded, are contracts between the parties.

In 1992, a New Jersey state court held that common-law defenses were available to a compulsive gambler seeking to avoid paying obligations represented by casino markers.³⁸

³⁷ Neither Illinois nor Mississippi, the states most involved in riverboat gaming, impose ceilings on betting or losing. Schmitz & Barnes, *supra* note 4, at A5.

³⁸ *Lomonaco v. Sands Hotel Casino and Country Club*, 614 A.2d 634, 638 (N.J. Super. Ct. Law Div. 1992). The plaintiff alleged that his behavior during the visit to the casino put the casino on notice that he suffered from a gambling addiction, and that casino employees exerted sufficient psychological pressure to override his free will. *Id.* at 635. The behavior which plaintiff alluded to consisted of being loud, obnoxious and causing a disruptive scene while losing large sums

The court carefully drafted its opinion to ensure that the scope would not be too far-reaching. Specifically, the court held that compulsive gambling, in and of itself, would not suffice to invalidate the contracts.³⁹ Instead, the court noted that the compulsive gambler might have demonstrated, through his words and actions, a lack of free will to contract which would subsequently void the markers.⁴⁰ The court recognized that the New Jersey Casino Control Act did not preclude the assertion of common-law contract defenses, but simultaneously rejected the argument that compulsive gambling should be an independent basis for voiding contracts.⁴¹

Thus, a compulsive gambler may successfully assert a common-law contract defense in order to avoid his gaming obligations. However, recovery in such actions would not be premised on the gambler's compulsive disorder; instead, the result would flow from the application of established legal principles which prohibit one party from taking advantage of another when negotiating a contract. In order to successfully pursue such a claim, the compulsive gambler must demonstrate that all elements of the common-law defense are present, a burden which the *Lomonaco* court clearly indicated is not necessarily satisfied by simply being a compulsive gambler.⁴²

of money at the gaming tables. *Id.*

³⁹ *Lomonaco*, 614 A.2d at 639.

⁴⁰ *Id.* at 638-39.

⁴¹ *Id.* at 637-39.

⁴² *Id.* at 638-39. The *Lomonaco* court held that the facts in the case *might* support a defense of duress or unconscionability, but held the validity of the defenses to be a question of fact, thereby establishing that the disorder of compulsive gambling does not necessarily encompass the elements of the defenses. *Id.* Additionally, the court held that the elements of the common-law defense of incapacity had not been demonstrated, again indicating that the disorder alone does not create a defense. *Id.* at 638.

IV. CLAIMS BY THIRD PARTIES

The second category of complaints against casinos arising from their involvement with compulsive gamblers consists of complaints asserted under wrongful death statutes following the suicide of the gambler.

A. *Wrongful Death Actions*

At common-law, death did not give rise to a viable tort claim for recovery of damages resulting from the death; however, wrongful death statutes alter this rule.⁴³ Under Mississippi's wrongful death statute, an action may be brought in situations where death resulted from "any real, wrongful or negligent act or omission" which would have given the decedent a cause of action had he survived.⁴⁴ An action may be initiated by a surviving spouse, a surviving child or other person as described in the statute.⁴⁵ A plaintiff in a wrongful death action may recover monetary damages to compensate for the death of the represented party⁴⁶ provided that the act of the defendant is shown to have been the proximate cause of death.

B. *Case Law*

A California state court rejected a wrongful death claim alleging that a casino breached a contractual duty to the decedent.⁴⁷ The court held that the contracts on which the plaintiffs relied, check cashing agreements establishing a monetary limit, were insufficient to create a duty since the decedent

⁴³ KEETON ET AL., *supra* note 13, § 127 at 945-46.

⁴⁴ MISS. CODE ANN. § 11-7-13 (Supp. 1994).

⁴⁵ *Id.* A wrongful death action may be pursued by a surviving spouse, child, parent, sibling or by the decedent's personal representative on behalf of the beneficiaries under the wrongful death statute. *Id.*

⁴⁶ *Id.* Plaintiff's recovery may include, but is not limited to, property damages, medical expenses and funeral expenses. *Id.*

⁴⁷ Duff v. Harrah S. Shore Corp., 125 Cal. Rptr. 259 (Cal. Dist. Ct. App. 1975).

necessarily rescinded the contracts when he requested that the casino cash checks exceeding the limit.⁴⁸ Characterizing the plaintiffs' argument as nothing more than an effort to impose a duty on the casino not to allow the decedent to rescind the contract, the court rejected the claim summarily.⁴⁹

C. Application of Wrongful Death Claims to Casinos

Since wrongful death statutes allow actions only when the decedent would have been able to pursue a claim had he survived, the plaintiff asserting a wrongful death claim faces many of the same obstacles which confront a compulsive gambler bringing a tort action. The plaintiff must show that the casino owed a duty to the gambler, breached that duty and proximately caused the suicide of the bettor. With respect to establishing a duty, the plaintiff occupies a position identical to that of a compulsive gambler seeking to recover his losses.⁵⁰ However, even if a wrongful death plaintiff succeeds in establishing the existence and breach of a duty, there is an additional problem which must be overcome before recovery will be forthcoming. The statutes require the plaintiff to show that the defendant's actions proximately caused the death of the gambler. This will likely be a difficult burden to bear, since tort principles ordinarily treat suicide as an unforesee-

⁴⁸ *Duff*, 125 Cal. Rptr. at 261. The court reasoned that the agreements probably were not contracts in the legal sense due to the supposed inability of the casino to claim a breach if the gambler refused to submit checks for cashing. *Id.* at n.2. However, the court pointed out that its decision was not grounded in this assumption, since the agreements might have contained terms, unknown to the court, with the effect of creating a binding contract. *Id.* The court instead premised its ruling on the fact that any contract which might have existed ceased to exist either "prior to or concurrently with its alleged breach," since the gambler explicitly requested that checks in excess of the limit be cashed. *Id.* at 261. Therefore, the court found that, regardless of any previous contractual duty, there was no duty at the time the casino cashed the checks which exceeded the agreement's limit and allegedly resulted in the gambler's suicide. *Id.*

⁴⁹ *Id.* The court stated that holding the casino to such a duty would be as unreasonable as holding that the casino had a "duty not to let him kill himself." *Id.*

⁵⁰ For a discussion of the potential methods of establishing a duty to the compulsive gambler, see *supra* notes 31-39 and accompanying text.

able intervening cause breaking the causal chain.⁵¹

V. CONCLUSION

Based upon a survey of existing case law and the application of general legal principles, it appears that the compulsive gambler seeking to recoup his losses will face a bitter struggle in establishing his claim. Case law supporting his position is tenuous, and arguments for the imposition of a statutory duty on casinos fail to demonstrate the advisability of such an extension of "dram-shop" liability.

However, despite the uniform rulings of the earlier cases, there is language which could support an argument that a casino has a duty to monitor a compulsive gambler when it has actual knowledge of his condition. Additionally, as the gaming industry experiences new growth, more claims are sure to emerge. Absent legislative action which explicitly precludes the advancement of claims of this nature, the determination of the validity of these claims will fall to the judiciary. At the present time, it appears that casinos bear no legal obligation to monitor or control the wagers of patrons; however, as these new claims arise and are pursued, the scope of the relationship between the gambler and the casino will necessarily be fully examined. The cases and legal principles discussed herein provide a beginning point for such an examination.

Joy Wolfe

⁵¹ KEETON ET AL., *supra* note 13, § 44 at 310-11. The general rule with regard to the effect of suicide on the causation element of a tort claim is that if the decedent's suicide was not due to any mental deficiency, then the choice to take one's life is viewed as abnormal and is considered a superseding cause relieving the defendant of liability. *Id.* at 311.

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